IN THE

SUPREME COURT OF MISSOURI

NO. SC84648

STATE OF MISSOURI,

Respondent,

v.

KIMBER EDWARDS,

Appellant.

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT
THE HONORABLE MARK D. SEIGEL, JUDGE

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from Appellant's conviction for first degree murder (§ 565.020, RSMo 2000) for which Appellant was sentenced to death. Because a sentence of death was imposed, this Court has exclusive appellate jurisdiction over this appeal. MO. CONST. art. V, § 3.

STATEMENT OF FACTS

Appellant was indicted in St. Louis County Circuit Court on one count of first degree murder and one count of armed criminal action for the contract killing of his ex-wife, Kimberly Cantrell, who was shot to death in her University City home on August 22, 2000 (L.F.20-21).[1] A jury trial on the murder charge was held in St. Louis County Circuit Court before Judge Mark D. Seigel from April 17 to April 26, 2000 (L.F.8-10). The sufficiency of the evidence to support Appellant's murder conviction is not challenged, but the sufficiency of the evidence to support the statutory aggravating circumstance is. Viewed in the light most favorable to the jury's verdict, the evidence at trial showed that:

The story of this case began in 1985 when Appellant and Kimberly Cantrell, the murder victim, were married (Tr.1326). Their daughter Erica was born in 1986 (Tr.991). They divorced in 1990, and Appellant was ordered to pay $35 per week in child support (Tr.1327). In 1995, Appellant's support payment increased to $351 per month (Tr.1328, 1339). Appellant filed three motions to modify seeking to reduce this payment, but was unsuccessful (Tr.1327-32).

Because Appellant failed to pay any child support from March 1999 to March 2000, he was indicted for the Class D felony of criminal non-support (Tr. 1665,1669-71;State's Ex. 84A). The indictment listed the victim as a witness in the case (Tr. 1671; State's Ex.

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[1]The trial court later severed the armed criminal action charge from the murder trial (L.F. 748).

84A). The State made a plea offer to Appellant consisting of an SIS, five years probation, paying a lump-sum payment of $1500, and having his support payment raised to $500 per month (Tr.1686-89). Appellant never responded to that offer (Tr.1691). A scheduling conference in the non-support case was scheduled for August 25, 2000, two days before the victim's body was discovered (Tr.1673-74, 1693).

Appellant, a St. Louis City Correctional Officer, and his wife, Jada, owned twelve apartments on Palm Street in the St. Louis City (Tr.1221,1712,1804). In Spring or Summer 2000, Appellant asked Hughie Wilson, a former tenant and apartment complex employee, if he knew where Appellant could get a "throwaway" gun or "burn," which is a gun used once and then discarded (Tr.1621,1651-52). At that time, Hughie's brother, Orthel Wilson, was living in one of Appellant's apartments at 2101 Palm (Tr.1421-22, 1807,1856).[2] Orthel, whom Appellant also referred to as "Theo," lived rent-free in the apartment in exchange for doing maintenance work and other jobs for Appellant at the apartments (Tr.1005-06, 1813, 1851).

In early August 2000, Hughie, while visiting his brother Orthel at the Palm Street apartment, saw a .38 caliber handgun sitting on a table in Orthel's room (Tr.1612-14, 1654). Appellant was also present in the apartment and he told Orthel to put the gun away,

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[2]To avoid confusion, Hughie Wilson and Orthel Wilson are referred to by their first names.

which he did (Tr.1614). Hughie later testified that the gun he saw looked similar to the gun eventually identified as the murder weapon (Tr.1615;State's Ex. 52).

Appellant visited Orthel at the apartment after 8 p.m. on August 21, 2000 (Tr.1428). The next morning, August 22, 2000, Orthel and his roommate, Donnell Watson, drove in Mr. Watson's car Orthel to the Creve Coeur Racquet Club, where they both worked (Tr.1424,1430). Orthel had a black backpack with him when he left that morning (Tr.1433). After they got off work at approximately 4 p.m., Orthel asked Mr. Watson to drop him off at the corner of Midland and Olive (Tr.1436). Orthel, who was carrying his black backpack, got out of the car at 4:30 p.m. (Tr.1438-39). The victim lived at 1122 Midland, which was only 200-300 yards from Olive and Midland (Tr.992,1279).

The victim's next-door neighbor, ninth-grader Christopher Harrington, saw Orthel, with his black backpack, knocking and banging on the victim's door late that same afternoon (August 22) (Tr.1106). Orthel walked away after no one answered the door (Tr.1083). Christopher's twelve-year old brother, Brandon Harrington, was also home that afternoon and heard several gunshots come from the victim's apartment at approximately 5:30 p.m. (Tr.1111-12,1115). He heard a woman scream after the first shot and also a door slamming (Tr.1112-13, 1121).

The victim was seen leaving work at approximately 5:06 p.m. on August 22 (Tr.1710; L.F.448). It was a twelve- or thirteen-minute drive to get from the victim's place of employment to her home (Tr.1277). The victim was enrolled in a computer class for the Fall 2000 semester at St. Louis Community College, Meramec Campus (Tr.1709). The

first class was held on August 22, 2000, at 7:30 p.m., but the victim did not attend (Tr.1709; L.F.450). Finally, the parties stipulated that the victim did not show up for work the morning of August 23, 2000, and never called to say she was not coming to work, "which was unusual for her" (Tr.1710; L.F.448).

On August 23, 2000, the victim's and Appellant's daughter, Erica, called her Aunt Phyllis (the victim's sister) to tell her that the victim had not shown up for work (Tr.975, 995). Erica was scheduled to return home to her mother the next day after having been with Appellant the previous three weeks (Tr.994). Concerned that she could not contact the victim and not knowing where the victim was, Aunt Phyllis, along with Appellant's mother (the victim's ex-mother-in-law) and another woman, went to the victim's home at 9:15 p.m. on August 23 (Tr.974-77). They entered with a key Aunt Phyllis had and discovered the victim's body (Tr.978). The victim had been shot twice in the head at close range (Tr.1132-40). Either gunshot wound would have killed her (Tr.1147).

After talking with the victim's family and partially investigating the crime scene, University City detectives went to Appellant's St. Louis City home in the early-morning hours of August 24 to see if Appellant had any information that could assist them in the investigation and to exclude him as a potential suspect (Tr.1241-42,1256,1280). Appellant voluntarily agreed to go to the University City police station with them (Tr.989, 1242,1464). The detectives drove Appellant, his wife, Jada, Erica, Appellant's daughter Britney, and Jada's daughter Tierra, to the police station (Tr.999,1243-44,1260,1465).

Appellant told the detectives that he did not kill the victim and did not know anybody who would want to kill her (Tr.1193-94,1212,1222,1256-57). Appellant said that he had been out of town, had returned on August 22, and had spent the day taking the girls to appointments and working on an electrical problem for a tenant in one of his Palm Street apartments (Tr.1195,1257,1263). Appellant told the detectives that he avoided the victim because they argued over custody and child support issues (Tr.1232). He said that he and the victim were involved in an ongoing dispute over child support and that the victim was bitter and angry over it (Tr.1232-33). The detectives drove Appellant, his wife, and two of the girls (Britney and Tierra) back home after the interviews (Tr.1196, 1305). Erica was placed in Aunt Phyllis's custody. (Tr.983,1004).

On August 26, 2000, the detectives went to Palm Street to interview the tenant Appellant helped with the electrical problem (Tr.1263). While they were there they saw Orthel Wilson sitting on the steps in front of the apartments (Tr.1264-66). Because Orthel matched the description of the person the victim's next-door neighbor had seen knocking on the victim's door the afternoon of August 22, they decided to talk to him also (Tr.1267). Orthel agreed to go with the detectives to the police station for an interview (Tr.1268). In Orthel's apartment, the detectives found a black backpack matching the description of the one the victim's neighbor saw (Tr.1269-70). Inside the backpack, police found rubber fingertips (Tr.1278). After interviewing Orthel, the police charged him with first degree murder in the victim's death (Tr.1274).

The next day, August 27, 2000, Orthel accompanied the police to a vacant house located on 21st Street in St. Louis City, where he had hidden the murder weapon (Tr.1343-44,1474-76). The detectives found the gun and a box of ammunition hidden between some doors (Tr.1347,1474-77). The gun had recently been fired and three rounds were missing (Tr.1980-81). During the investigation, the police recovered three bullets, two from the victim one from inside a furnace room in the victim's home (Tr.1148, 1182). The gun that was recovered was later determined to be the murder weapon (Tr.1589, 1591).

Later that day, detectives arrested and interviewed Appellant (Tr.1155-56,1349). The detectives informed Appellant that Orthel was in custody, that they had talked to Orthel, and that they had recovered the murder weapon (Tr.1352-53). After hearing this, Appellant said he would make a statement (Tr.1354).

After receiving his Miranda warnings and waiving them in writing, Appellant confessed that he had hired someone named "Michael" or "Mike" to kill the victim (Tr.1355-61;State's Ex. 80B).[3] Appellant said "Michael" overheard him talking about the problems Appellant was having with the victim, and he told Appellant that he taken care of a similar problem by doing that person in (Tr.1361-62). Appellant said he and "Michael" had two meetings, one in March 2000 and the other on Palm in April 2000, and that Appellant ultimately agreed to pay "Michael" $1600 to kill the victim (Tr.1362-64). Appellant said he told "Michael" that he would only deal with him and no one else (Tr.1364). During the

[3]"Michael" is never further identified anywhere in the record.

interview, the detectives gave Appellant a calender so he could determine the dates on which he and "Michael" met (Tr.1363).

Appellant said that he had additional meetings with "Michael" in June, July, and August 2000 and that he learned that "Michael" may be working with another individual (Tr.1365-68). Appellant said he told "Michael" the victim's address, her regular routine, and that Appellant would be able to get a key to the victim's house (Tr.1367-70).[4] Appellant told "Michael" that the victim must be dead before a scheduled court appearance in Appellant's non-support case (Tr.1370).

The detectives asked Appellant if "Michael" was really Orthel Wilson, but Appellant said that he was not (Tr.1373). But Appellant did say that Orthel ("Theo") approached him and asked why Appellant did not give "the job" to him (State's Ex. 80C). Later that same day, Appellant saw Orthel sitting the passenger seat of the car Michael arrived in for a meeting with Appellant (Tr. 1375; State's Ex. 80C). Appellant also said that Orthel had approached him and said he had helped with the murder and that he wanted Appellant to give him some money (Tr.1375). Appellant said he told Orthel to get his money from "Michael" (Tr.1375).

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[4]Other evidence showed that Erica kept a key to her mother's house in her backpack, which she had with her at Appellant's house during the time she stayed with him just before her mother's murder (Tr.1008-10).

Appellant refused to make a videotaped statement and instead produced a written statement (Tr.1376). Appellant first prepared an outline and then wrote a two-page statement confirming what he had told the detectives (Tr.1376-85;State's Ex. 80C).

The next day (August 28, 2000) the detectives again talked to Orthel (Tr.1389). Following that conversation, they re-interviewed Appellant (Tr.1389). After again being read his Miranda rights and waiving them in writing, Appellant told the detectives that he had left out some details and wanted to make another statement (Tr.1389-98;State's Ex. 81B). Appellant then wrote a one-page statement in which he said that Orthel ("Theo") approached him on August 3 and told Appellant that he and "Michael" were working together, but that Appellant at first acted like he did not know what Orthel was talking about, but then told Orthel that he would get paid whatever Orthel and Michael had agreed on (Tr.1401-03;State's Ex. 81C). Appellant also wrote that on August 24, Orthel left a message saying that the job was done and that he wanted to get paid (Tr.1402; State's Ex. 81C).

Appellant testified during the guilt phase and denied that he had met with Orthel on August 22, 23, or 24 (Tr.1863). He also said that he had nothing to do with the victim's murder, but that he had given a written statement to police saying that he did (Tr.1851,1868-69). The jury found Appellant guilty of first degree murder (L.F.481).

During the penalty phase the State presented only two victim-impact witnesses, the victim's sister and brother (Tr.1930-36). Appellant presented nine witnesses who were family, friends, and coworkers (Tr.1936-2030). The jury found one statutory aggravating

circumstance: that Appellant hired Orthel Wilson and/or a person known only as "Michael" or murder" the victim (L.F.494). It recommended a sentence of death (L.F.494). The trial court, after overruling Appellant's motion for new trial, sentenced Appellant to death (L.F.750-52).

ARGUMENT

I.

The trial court did not clearly err in overruling Appellant's *Batson* objections to the State's peremptory strike of Veniremembers Evans (No. 50) and Burton (No. 56), because the State offered valid, race-neutral explanations for the strikes and Appellant failed to prove that these explanations were pretextual.

Appellant contends that the trial court clearly erred in overruling his *Batson* objections to the State's peremptory strike of two veniremembers. The record shows that the prosecutor offered valid, race-neutral explanations for the strikes that are supported by the record.

A. Standard of Review

This Court reviews a trial court's decision on a *Batson* challenge under a clearly erroneous standard. An appellate court "may not reverse a trial court's decision as to whether the prosecutor discriminated in the exercise of his peremptory challenges unless it finds that decision clearly erroneous." *State v. Griffin*, 756 S.W.2d 475, 482 (Mo. banc 1982). "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm impression that a mistake has been committed." *State v. Antwine*, 743 S.W.2d 51, 66 (Mo. banc 1987). "If the trial court's action is plausible under review of the record in its entirety, an appellate court may not reverse it although had it been sitting as the trier of fact it would have

weighed the evidence differently." *State v. Brinkley*, 753 S.W.2d 927, 930 (Mo. banc 1988).

Deference to trial court findings on the issue of discriminatory intent makes particular sense, because the finding will largely turn on evaluation of credibility and the best evidence will often be the demeanor of the attorney who exercises the challenge. *See Hernandez v. New York*, 500 U.S. 352, 365 (1991). "The credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that is settled, there seems nothing left to review." *Id.* at 367.

Parties may not use peremptory challenges against venire members based "solely" on impermissible grounds, such as gender and race. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). The Supreme Court has outlined a three-step approach in analyzing *Batson* claims:

> Under our *Batson* jurisprudence, once the opponent of peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful discrimination.

Purkett v. Elem, 514 U.S. 765, 767 (1995). This Court has adopted this three-part test in determining whether peremptory strikes resulted from an impermissible motive:

> First, the defendant must object to the state's peremptory strike by identifying the protected group to which the venireperson belongs. The state must then provide a reasonably specific, clear, race-neutral and/or gender-neutral explanation for the strike. Once the state provides a legitimate explanation, the burden shifts to the defendant to show that the state's explanation was pretextual and that the strike was actually motivated by the venireperson's race or gender.

State v. Barnett, 980 S.W.2d 297, 302 (Mo. banc 1998) (citations omitted).

Appellant complains that the prosecutor's explanations for his strikes were not plausible and should have been rejected by the trial court. But the Supreme Court rejected this precise argument in *Purkett*. "The second step of this process does not demand an explanation that is persuasive, or even plausible. *Purkett*, 514 U.S. at 767-68. "At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez*, 500 U.S. at 360.

Appellant contends that the prosecutor's explanations for the strikes should be rejected because they were clearly pretextual and were not related to the veniremembers' ability to perform as jurors. But the *Purkett* Court, in reversing a decision of the Eighth Circuit, directly rejected this type of analysis:

> The Court of Appeals appears to have seized on our admonition in *Batson* that to rebut a prima facie case, the proponent of a strike "must give 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges," and

> that the reason must be "related to the particular case to be tried." This warning was meant to refute the notion that a prosecutor could satisfy his burden of production by merely denying that he had a discriminatory motive or by merely affirming his good faith. What it means by a "legitimate reason" is not a reason that makes sense, but a reason that does not deny equal protection.

Purkett, 514 U.S. at 768-69, *quoting Batson*, 467 U.S. at 98 (citations omitted).

Finally, "the prosecutor's explanations need not rise to the level justifying exercise of a challenge for cause." *Batson*, 476 U.S. at 97. "*Batson* leaves room for the state to exercise its peremptory challenges on the basis of the prosecutor's legitimate 'hunches' and past experience. . . ." *Antwine*, 743 S.W.2d at 65.

> Jury selection is, after all, an art and not a science. By their very nature, peremptory challenges require subjective evaluations of veniremen by counsel. Counsel must rely upon perceptions of attitudes based upon demeanor, . . . ethnic background, employment, marital status, age, economic status, social position, religion, and many other fundamental background facts. There is, of course, no assurance that perceptions drawn within the limited context of voir dire will be totally accurate. Counsel simply draws perceptions upon which he acts in determining the use of peremptory challenges.

Id. at 64.

B. The State's Race-Neutral Reasons Were Not Pretextual

After the state announced its peremptory challenges, Appellant raised *Batson* challenges to the State's strikes of Veniremembers Evans (No.50) and Burton (No.56), both of whom were African-American (Tr.914,916).

1. Veniremember Evans

The prosecutor explained that he struck Veniremember Evans because Ms. Evans believed that her niece had been treated unfairly by the criminal justice system (Tr.914-15). The statements Ms. Evans made during voir dire supported the prosecutor's reasons for exercising the strike. Ms. Evans stated that her niece had been arrested simply because she had let her boyfriend use her car and that after the police determined that she was not involved in the crime her boyfriend committed, they simply let her go without saying a word:

> I don't know if you have this information concerning me. My niece was arrested, she was put in jail for three months because her boyfriend was involved in the courtroom where the policeman got shot by his partner because I believe he was selling drugs. They arrested my niece because she had taken whereabouts. I believe she had let him use her car. When the trial -- when it went to trial the young man confessed but they did not say anything else to my niece. They just let her go and my family and I did go down to the jail house to encourage her.

(Tr.775). When asked if she thought her niece was treated unfairly, Ms. Evans responded that the experience traumatized her niece and that her niece required counseling (Tr.776).

In addition, during death-qualification voir dire, Ms. Evans said that being put in a position to make a decision concerning another person's life made her "very nervous," she expressed difficulty in being able to consider the full range of punishment, and said that she would "try" to consider both sentences (Tr.525,529-31).

Appellant argues that the prosecutor's explanation for striking Ms. Evans was pretextual because the State did not strike a similarly situated white juror, Ms. Tincu (Veniremember No.63). But the record shows that these two veniremembers were in no way similarly situated.

Appellant contends that Ms. Tincu was also distrustful of the criminal justice system, but the record shows that she simply questioned why a person convicted of vehicular manslaughter was treated more leniently than her nephew, who was only convicted of burglarizing homes:

> [Veniremember Tincu]: I have a nephew in prison right now. He's in his fifth year and for burglary. I also witnessed a vehicular manslaughter case where the guy was convicted of two counts of manslaughter and I guess my problem is that he was let out of prison after seven years and my nephew is still in prison. It's like a constant thing with my sister. I have a hard time understanding how the courtroom system works.
>
> . . . .
>
> [The Prosecutor]: So it sounds like you are upset that your nephew was treated too harshly?

[Veniremember Tincu]: Right.

. . . .

[The Prosecutor]: You found in another case a person was treated too leniently?

[Veniremember Tincu]: Yeah, for killing two people.

[The Prosecutor]: Compared to your nephew?

[Veniremember Tincu]: For home burglaries.

[The Prosecutor]: Is there anything about the experience that you went through with your nephew and your sister, that's your nephew's mother?

[Veniremember Tincu]: Right.

[The Prosecutor]: That you feel would prohibit you from being fair to both sides in this case?

[Veniremember Tincu]: I'm not a hundred percent sure. I think I can be. I just have a real problem with the situation with my nephew and seeing things, you know, he broke into a few houses, he did wrong, here's somebody who kills two people, he's out in seven years.

[The Prosecutor]: Again, I understand you are disturbed about the disparity for treatment for two different trials, one you think is far more serious than the other?

[Veniremember Tincu]: Right.

(Tr.778-79). In fact, Appellant's counsel was so concerned about this veniremember that he inquired whether she would seek to "balance the books" and treat Appellant, who was charged with murder, more harshly (Tr.780).

In addition, even after the trial court asked the veniremembers whether they could follow an instruction telling them that they cannot consider the fact that the defendant does not testify in deciding the case (Tr.843), Ms. Tincu stated that she would hold it against the defendant if he did not testify (Tr.846).

Finally, Ms. Tincu informed the court that two associates of hers had been victims of a violent crime in which one was killed and that she would "try" to separate her friends' situation from the one in this case:

> [Veniremember Tincu]: Two of my associates were carjacked, raped, shot and left for dead. One died.
>
> . . . .
>
> [Appellant's Counsel]: Okay. Starting out--starting out fresh, not knowing, not having any evidence before you, is there anything about that experience, starting off from the bat, are you putting Kimber Edwards at a disadvantage?
>
> [Veniremember Tincu]: I don't think so.
>
> [Appellant's Counsel]: Okay. I don't mean to push you, is it something you are not sure you would be able to do?
>
> [Veniremember Tincu]: I would like to say I would–would be able to keep that separate. At the same time, knowing someone close to me that was murdered

in the same way that this woman was, I presume, we talked earlier -- earlier, there was a gun, I assume she was shot, so I think that there will be some similarity. I would try to separate that out.

[Appellant's Counsel]: You don't know for a fact that you could?

[Veniremember Tincu]: That's right.

(Tr.874-75).

Appellant's concern with Ms. Tincu serving on his jury was so great that he attempted to have her stricken for cause (Tr.906-07). When that effort failed, Appellant ultimately used one of his peremptory strikes to prevent Ms. Tincu from serving (Tr.922).

The record thus shows that Ms. Evans, the one about whom Appellant made the *Batson* challenge, and Ms. Tincu were in no way similarly situated. Any preconceived notions or biases Ms. Evans had about the criminal justice system favored Appellant in that she was unsure whether she could vote for the death penalty, and her niece was arrested and held in jail for three months while the police were investigating a crime she had nothing to do with.

Any preconceived notions or biases about the system held by Ms. Tincu, on the other hand, definitely favored the state in that her nephew, convicted of home burglaries, was treated more harshly than someone who had been convicted of vehicular manslaughter; she said she would hold it against Appellant if he did not testify even if the court instructed her otherwise; and, finally, two associates of hers were the victims of a violent crime in which one of them was killed.

If these two veniremembers were so similarly situated, then why did Appellant make such an effort to keep Ms. Tincu from serving on his jury, yet make a *Batson* challenge to the state's attempt to remove Ms. Evans? The short answer is that they were not similarly situated. Their responses during voir dire and Appellant's efforts to remove Ms. Tincu cuts against Appellant's claim that they were. The trial court did not clearly err in rejecting Appellant's *Batson* challenge to the state's peremptory strike of Ms. Evans.

2. Veniremember Burton

Appellant also made a *Batson* challenge to the state's peremptory strike of Mr. Burton (Veniremember No.56), which the trial court rejected. The prosecutor's explanation for the strike was that Mr. Burton was a postal worker, and he always struck postal workers from the venire (Tr.916-18). Despite the State's strikes of two other similarly situated veniremembers, one who worked for FedEx and one whose spouse was a postal worker, Appellant complained that this explanation was pretextual because two other veniremembers who worked for bureaucracies i.e., the City of Clayton and the military, and who Appellant alleged were "similarly situated" with Mr. Burton were not struck (Tr.918-19). The prosecutor responded that Mr. Burton was not struck simply because he worked for a bureaucracy, but because he was a postal worker (Tr.919-20).

Employment, of course, is a valid race-neutral basis on which to base a strike. *State v. Smulls*, 935 S.W.2d 9, 15-16 (Mo. banc 1997); *State v. Nicklasson*, 967 S.W.2d 596, 614 (Mo. banc 1998). This Court–as recently as this year–and the court of appeals have repeatedly held that a peremptory strike based on the prospective juror's employment as a

postal worker is valid under *Batson*. *See State v. Williams*, 97 S.W.3d 462 (Mo. banc 2003); *Smulls*, 935 S.W.2d at 15-16; *State v. Pepper*, 855 S.W.2d 500, 502-03 (Mo. App. E.D. 1993). The trial court did not abuse its discretion in overruling Appellant's *Batson* challenge to the state's peremptory strike of Mr. Burton.

II.

The trial court did not abuse its discretion by refusing to allow Appellant to inform the venire during death-qualification voir dire that the victim was the mother of Appellant's child because this action did not prevent Appellant from discovering disqualifying bias or prejudice in that the trial court never restricted Appellant's ability to ask such a question during general voir dire, Appellant's question exceeded the proper scope of death-qualification voir dire, and whether the murder victim was the mother of Appellant's child was not a "critical fact."

Appellant contends that the trial court abused its discretion during voir dire when it prevented Appellant from informing the venire during voir dire that the State's theory of the case was that Appellant had hired someone to kill the mother of his child. But the trial court only restricted Appellant's questioning during death-qualification voir dire, not general voir dire. Moreover, Appellant's question was not proper during, and the exceeded the scope of, death-qualification voir dire. Finally, the fact that the victim was the mother of Appellant's child was not a "critical fact" that Appellant was entitled to divulge to the venire.

A. Standard of Review

The trial court is vested with wide discretion in the conduct of voir dire, including determining the appropriateness of specific questions. *State v. Oates*, 12 S.W.3d 307, 310 (Mo. banc 2000). "[T]he trial judge is in the best position 'to judge whether a disclosure of facts on *voir dire* sufficiently assures the defendant of an impartial jury without at the same

time amounting to a prejudicial presentation of the evidence.'" *State v. Clark*, 981 S.W.2d 143, 147 (Mo. banc 1998), *quoting State v. Leisure*, 749 S.W.2d 366, 373 (Mo. banc 1988). A trial court's rulings during voir dire are reviewed only for an abuse of discretion. *Oates*, 12 S.W.3d at 311; *Clark*, 981 S.W.2d at 146. "The trial court abuses its discretion only if the voir dire permitted does not allow for the discovery of bias, prejudice, or impartiality." *State v. Barton*, 998 S.W.2d 19, 25 (Mo. banc 1999). To be reversible error, an appellate court must find both that the trial court abused its discretion and that the defendant was prejudiced as a result. *Oates*, 12 S.W.3d at 311. The defendant has the burden of showing a "real probability" that he was prejudiced by the abuse. *Id.*

B. Death-Qualification Voir Dire

During death-qualification voir dire, the State objected when Appellant's counsel began to explain the "State's theory" of the case regarding statutory aggravating circumstances (Tr.343). During a bench conference, Appellant's counsel explained that she wanted to ask the veniremembers whether they could seriously consider a sentence of life without parole if the State proved that Appellant and another killed his ex-wife, who was the mother of his child:

> [Appellant's Counsel]: . . . . We have talked in general about aggravating circumstances being facts that make a particular murder in the first degree worse. Okay. In this case, the State's theory is–
>
> [The Prosecutor]: Judge, I object to going into specifics of aggravating circumstances. I don't think it's appropriate. May we approach the bench.

. . . .

The Court: What exactly are you going into?

[Appellant's Counsel]: Your Honor, I'll read the question exactly. It is my intention to ask–to state it is the State's theory that Kimber Edwards and another killed his ex-wife, the mother of his child. If the State proves its theory beyond a reasonable doubt, will you be able to seriously consider life without the possibility of parole.

. . . .

The Court: Let me say this: I think, first of all, I think that portion of the question, the mother of his child, is inappropriate in voir dire. If you–I see nothing wrong with asking the other portion of the question, is that the State is going -- has charged that, obviously, you've said charged the defendant with murder first degree for killing his ex-wife. I think you said that.

[The Prosecutor]: I did say that.

The Court: I see no reason why you can't say that it's the death of the mother of his child. I don't know what–the rest of the question is inappropriate.

[Appellant's Counsel]: If I may, the point is that the sensitive issues in this case, if we reach the sentencing phase, will be one of the State's aggravating circumstances and that is that it was a contract killing, which is what I'm trying to ask here and the other sensitive issue, the one necessarily submitted in a–in a statutory aggravator, but that it is the mother of his child that was

killed and this is the question I'm trying to ask in one question and not drag it out, but this is the question I believe falls under State versus Lewis Clark and that it is inappropriate not to allow the defendant to voir dire on certain highly sensitive issues that might prevent the jury from considering the punishment of life. We need to know if there are people on this panel, it's a contract case, that's it and is that an automatic death, this is the mother of his child. I have to have a way to ask that.

. . . .

The Court: That's the ultimate issue, but I think she is entitled to ask, I think you are entitled to tell them the State has charged first degree murder, charged it as a contract killing. I think you can say that.

[Appellant's Counsel]: Okay.

The Court: I still don't think it's appropriate to ask it about or at least tell the jury she was the mother of his child. That is a specific aggravator.

. . . .

[Appellant's Counsel]: It's not a statutory aggravator. I was arguing it falls under the sensitive issue situation that was covered in State versus Clark.

The Court: I'll sustain the objection to that. You may ask other questions, what we have covered regarding the fact it is a contract killing, but beyond that–

(Tr.343-47). Appellant's counsel then asked the veniremembers whether they could seriously consider a life sentence if the State proved Appellant hired another person to kill

his ex-wife (Tr.347-48). Appellant's counsel did not ask any other question, either during death-qualification or general voir dire, to uncover any bias pertaining to the victim being the mother of one of Appellant's children (Tr.347-889).

C. The Trial Court Did Not Restrict All Voir Dire

Appellant complains that trial court abused its discretion because it prevented Appellant from disclosing a "critical fact" to the venire in violation of *State v. Clark*. *Clark* involved the murder of a father and his three-year-old daughter. *Clark*, 981 S.W.2d at 145. Before voir dire began, the trial court ruled that the defendant could not mention any circumstances of the case, specifically the murdered child's age, during voir dire. In response to the defendant's asking whether that ruling applied only to death-qualification and not general voir dire, and the trial court responded, "No, it goes to the entire spectrum of voir dire, entire spectrum." *Id.*

After voir dire began, the defendant again asked the court to permit voir dire on the child's age contending that it was critical to question the venire on this issue because of the potential for disqualifying bias. *Id.* at 145-46. The defendant's counsel explained that certain veniremembers may not be objective in considering the case once they know it involved the murder of a child. *Id.* The trial court refused to change its ruling and told counsel that he would "not be permitted to voir dire on the age of the victim." *Id.* at 146.

This Court, in reversing the trial court's ruling, held that a defendant is entitled to divulge "critical facts" to the jury in exploring whether veniremembers have potentially biased views. *Id.* at 147-48. This Court cautioned, however, that "[o]nly critical facts–facts

with substantial potential for disqualifying bias–must be divulged to the venire." *Id.* at 147. This Court's decision turned on the trial court's total ban on asking the veniremembers about the murder victim's age during any portion of voir dire:

> In the present case, the trial court completely precluded defense counsel from questioning prospective jurors on the specifics of the case being tried, in particular that one victim was only three years old. . . . . Due to the sweeping nature of the trial court ruling in this case, the defendant could not attempt to discover that bias.

Id. at 147.

Here, on the other hand, the trial court's ruling did not completely preclude Appellant from questioning the venire about the fact that the victim was the mother of one of Appellant's children. The trial court's ruling came during death-qualification voir dire, and the ruling itself, unlike the ruling in *Clark*, did not expressly prohibit any question on that issue during any other part of voir dire. Moreover, Appellant never inquired, or attempted to clarify, whether the ruling applied to just death-qualification voir dire, or to all voir dire. Finally, Appellant did not attempt to ask any further questions regarding this issue during general voir dire, even though other facts (contract killing and Appellant's confession) were divulged to the venire.

D. The Question Exceeded the Scope of Death-Qualification Voir Dire

The content of Appellant's question and the manner in which it was asked was not appropriate during death-qualification voir dire:

> Death qualification voir dire is only one part of voir dire in capital cases. The primary purpose of death qualification is to ascertain whether prospective jurors have such strong views about the death penalty that they cannot be impartial in sentencing.

Id. at 148. These inquiries are mandated by several United States Supreme Court decisions. *See Morgan v. Illinois*, 504 U.S. 719 (1992); *Wainwright v. Witt*, 469 U.S. 412, 423 (1985); *Witherspoon v. Illinois*, 391 U.S. 510, 522 n.21 (1968). Those inquiries relate to a potential juror's predisposition to vote either for or against the death penalty without regard to the evidence or instructions. Appellant's question had nothing to do with either of these inquiries, but instead related to potential bias the veniremembers had because Appellant contracted to have his child's mother killed. If this inquiry was appropriate during voir dire, it was better addressed during general and not death-qualification voir dire.

This Court noted in *Clark* that "[b]oth the United States Supreme Court and Missouri courts have reversed convictions where general voir dire was unduly restricted." *Clark*, 981 S.W.2d at 148. Again, the trial court's ruling here did not expressly restrict general voir dire.

E. Appellant's Question Did Not Involve A "Critical Fact"

Another, independent, ground for rejecting Appellant's claim is that the fact Appellant sought to question the venire about was not a "critical fact" under *Clark*. As mentioned above, a critical fact is one with a "substantial potential for disqualifying bias." *Id.* at 147. In *Clark*, this Court held that a veniremember's potential sympathy for a

murdered child qualifies as a critical fact. "A case involving a child victim can implicate personal bias and disqualify prospective jurors." *Id.* In *Oates*, this Court explained that a substantial potential for disqualifying bias among veniremembers may exist in cases where the murder victim is a child:

> The critical fact in *Clark* involved the brutal murder of a very young child. There exists a prevalent perception among society that the killing of an innocent child is never justified, regardless of any extenuating circumstances. It is by virtue of this common perception that the circumstances of the murder in *Clark* constitute a critical fact that necessitates allowing the defense to probe the venire panel during voir dire.

Oates, 12 S.W.3d at 311. Adding to this explanation of the critical-fact inquiry, the *Oates* court cautioned that "not every fact should be disclosed to the venire. Only critical facts, those with a substantial potential for disqualifying bias, need be revealed." *Id.* (footnote omitted).

Here, of course, the murder victim was not a child, but was merely the mother of the murderer's child. Whether the murder victim was the mother of a child, or even the mother of the murderer's child, is not a fact that may potentially evoke the emotional response with which the *Clark* court was concerned. The same "prevalent perception among society" that may exist with respect to the killing of a child is not present when the victim is simply the mother of the murderer's child. Whether the murder victim herself is a young child is, of course, an entirely different matter, as far as potential bias is concerned, from whether the

victim is the mother of the murderer's child. While the former has a "substantial potential for disqualifying bias," the latter does not.

III.

The trial court did not clearly err in refusing to suppress and admitting into evidence Appellant's statements to police because Appellant's rights under the Fifth and Sixth Amendments were not violated on the grounds that he was threatened or had requested counsel in that Appellant's statements were voluntarily given after he waived his Miranda rights, the police used no coercive tactics to obtain Appellant's statements, and Appellant did not request counsel during questioning.

Appellant contends that his oral and written statements he made to police in which he confessed to hiring someone to kill the victim should have been suppressed because they were coerced. The record, however, shows that Appellant's statements were voluntary, that the police used no coercive tactics to obtain Appellant's confession, and that Appellant did not request counsel during questioning.

A. Standard of Review

"When reviewing a trial court's ruling on a motion to suppress, the inquiry is limited to whether the court's decision is supported by substantial evidence." *State v. Rousan*, 961 S.W.2d 831, 845 (Mo. banc 1998). The appellate court views the facts and any reasonable inferences therefrom in a light most favorable to the ruling of the trial court and disregards any contrary inferences. *State v. Lewis*, 17 S.W.3d 168, 170 (Mo. App. E.D. 2000). If the trial court's ruling is plausible in light of the record viewed in its entirety, the appellate court may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Id.* Any conflicts in the evidence are for the

trial court to resolve, and the court of appeals is to defer to the trial court's superior position from which to assess credibility. *Rousan*, 961 S.W.2d at 845.

B. The Circumstances Surrounding Appellant's Confession

The victim's body was discovered at approximately 9:15 p.m. on Wednesday, August 23, 2000, and the police arrived shortly thereafter to begin their investigation (Tr.974). Several hours later, the police decided they wanted to talk to Appellant and fourteen-year-old Erica Edwards, the victim's and Appellant's daughter (Tr.991). Although Erica lived with her mother, she had been visiting Appellant during the three weeks before the murder and was to return home the day after (Thursday) her mother's body was discovered (Tr.994). The police went to Appellant's St. Louis City home to get a statement from him and to determine if he had any information on who might have murdered the victim (Tr.62,1256).

The police arrived at Appellant's house at approximately 3 a.m. on August 24, 2000 (Tr.1463). Four University City detectives accompanied by perhaps three or four St. Louis City police officers went to Appellant's home (Tr.1242, 1492-93). Because it was raining all the officers went inside the house (Tr.1493). The detectives told Appellant that his ex-wife had been murdered and asked if he and his wife, Jada, would go with them to the University City Police Station (Tr.1463-64).

Appellant and his wife voluntarily agreed to go with the detectives (Tr.62,999, 1242,1464-65,1781-82). Neither Appellant, nor his wife, were arrested or otherwise in custody when they agreed to go with the detectives (Tr.63,82). No guns or handcuffs were

displayed, and no one was arrested (Tr.1189,1243,1464-65,1781). The detectives drove Appellant and his wife in one car, while Erica and her eleven-year-old half-sister Tierra and her ten-year-old step-sister Britney, rode in a different police car (Tr.62,999,1243-44,1260,1465). Both Erica and Tierra testified that the police did not mistreat anybody while they were at Appellant's house (Tr.185,998,1785).

After a 25- to 35-minute ride to the police station, Appellant's interview began at approximately 4 a.m. (Tr.1251-52,1290). Appellant said that he had been out of town and had returned a day or two earlier (Tr.63). When he returned, he took his children to some appointments and went to his Palm Street rental property in St. Louis City to do some electrical work for a tenant (Tr.63,1195-96,1257). Appellant said that he did not have contact with the victim because they had been fighting over custody of Erica (Tr.1232-33). He said that he had nothing to do with the victim's murder and did not know who might have done it (Tr.1212,12222,1256).

Appellant's wife was separately interviewed as were the three girls (Tr. 81,1243-44). Appellant's wife stayed in a room by herself, while the girls stayed in the same room together (Tr.81-82,1244,1289,1293,1772). Appellant was interviewed for approximately one-and-one-half hours (Tr.1261). Appellant and the girls slept during some of the time they were there (Tr. 1252).

Appellant and his wife also allowed the officers to take their photographs and fingerprints (Tr.86-90,95-96). Appellant's wife also voluntarily agreed to give the officers a hair sample and treadwear impression from her shoe (Tr. 1319,1497,1518). She pulled

her own hair and gave it to the officers (Tr.1300,1518). After making the treadwear impression, the officers cleaned and returned the shoe to her (Tr.1318). The officers asked for these samples because during their investigation of the crime scene they found what they believed to be a female hair not belonging to the victim and a footprint (Tr.88,1303,1317-21).

Neither during, nor immediately after, these interviews were either Appellant or his wife were treated as suspects, and the police had no evidence connecting either of them to the crime (Tr.82-84,90,94,1256,1294-95,1503,1520). Appellant was free to leave at any time during his stay (Tr.1228).

Because Appellant was a "potential suspect," the sergeant in charge of the investigation instructed another officer to prepare a form to remove Erica from Appellant's custody (Tr.82-83,94-95,138,1304,1501-03). This form was prepared at 10 a.m. on August 24 while Appellant was still at the police station (Tr.83). The form, which was designed to be used in situations in which an individual had harmed a child in that person's custody, had to be modified to fit that particular situation (Tr.84,97-98). The officer purposefully did not mark the box indicating that Appellant had been arrested or was a perpetrator (Tr.97-98). Instead, the officer wrote on the form that Appellant was being questioned or investigated as part of a homicide investigation (Tr.97-99,1501-05). Erica left the police station with her Aunt Phyllis, her mother's sister to whom she was very close (Tr.983,1001,1004). Erica told police that she wanted to go home with Aunt Phyllis

(Tr.1004). Appellant, his wife, and the two remaining girls were driven home around noon on that day (Tr.64,85,1305,1824).

On August 26, detectives went to Appellant's rental property to verify his statement that he had been there to work on an electrical problem (Tr.65). While there, the detectives interviewed Orthel Wilson, who worked for Appellant and lived in one of Appellant's apartments (Tr.66,1264-66). Orthel admitted to the detectives that he knew Appellant (Tr.68,1265). Orthel also matched the description of the person whom the victim's next-door neighbors had seen knocking on the victim's door the day before her body was discovered (Tr.1267). Orthel made statements to the detectives indicating that he may have been at the victim's apartment on the day of the murder (Tr.67). Ultimately, Orthel voluntarily agreed to accompany the officers to the police station to be interviewed (Tr. 66,1268). During that interview, Orthel confessed to the victim's murder and said that Appellant had paid him to kill her (Tr.70). On August 27, after Orthel showed the officers where he had hidden the murder weapon and performed a re-enactment of the crime, Appellant became a suspect (Tr.91-92,1341-48,1473-77).

On August 27, the detective in charge of the investigation received information that Appellant was being held by St. Louis City police (Tr.1306-07). Appellant had been arrested on August 26 after getting into an altercation with a St. Louis City police officer, who was also the victim's cousin, over some parking tickets that the officer had written on cars illegally parked on Appellant's property (Tr.1726-35). Two University City detectives went to St. Louis City on August 27 and arrested Appellant just as he was being released

from custody (Tr.101-02,1160-62). They took Appellant to the University City Police Department and put him in an interview room (Tr.103,1166). After Appellant told the officers that he had not eaten and was hungry, they gave him something to eat and drink (Tr.103,1165). Appellant was then turned Appellant over to two other detectives, Gage and Siscel, who had just returned from recovering the murder weapon (Tr.113-15,1350).

Before asking Appellant any questions, the detectives showed Appellant that they had Orthel in custody (Tr.114,119-20,1352-53). They also told Appellant about the statement that Orthel had made and showed Appellant the murder weapon they had just recovered (Tr.114,119-20,1352-53). They informed Appellant that he was being booked for murder (Tr.115). Finally, they told Appellant that they would have to continue their investigation, which would include re-interviewing Appellant's family (Tr.119,1354-55,1414). Appellant told the detectives to leave his family alone (Tr.119-20). Appellant offered to make a statement if they left his family alone (Tr.1354-55). Detective Gage told Appellant that they would not re-interview his family if Appellant told them the truth about what happened (Tr.1417).

After Appellant was read his Miranda rights and waived them in writing, he confessed that he had hired someone name "Michael" to kill his ex-wife (Tr.116-18,121-22,1356-62). Appellant refused to allow the detectives to videotape his statement, but agreed to make a written one (Tr.122,1376). The detectives left Appellant alone with pen and paper and Appellant produced a three-page handwritten statement confessing that he had hired "Michael" to kill his ex-wife (Tr.122-24,1376-78;State's Ex.'s 80B,80C).

Because Appellant's statement differed from Orthel's, the officers conducted another interview with Orthel the next day, August 28 (Tr.125,1389). They then re-interviewed Appellant later that day (Tr. 127-28). During that interview, the detectives told Appellant that Orthel had said that Appellant had hired him to commit the murder (Tr.128). After he received and waived his Miranda rights, Appellant insisted that he had hired "Michael" but then conceded that Orthel may have been more involved than he previously indicated (Tr.128-30,1390-93,1401-03;State's Ex. 81B). The officers again left Appellant alone with pen and paper, and Appellant produced a one-page written statement in which he indicated that he knew Orthel was more involved than he had previously stated (Tr.128-30,1399-1400;State's Ex. 81C).

C. Appellant's Miranda Waiver And Confession Were Voluntary

When a defendant challenges the admissibility of a statement or confession on the ground that it was involuntary, the state has the burden of proving it was voluntary by a preponderance of the evidence. *Rousan*, 961 S.W.2d at 845. "The test for voluntariness is whether, under the totality of the circumstances, the defendant was deprived of the free choice to admit, deny, or to refuse to answer and whether physical or psychological coercion was of such a degree that the defendant's free will was overborne at the time he confessed." *Id.* "In addition to the question of whether the defendant was advised of his rights and understood them, factors to be considered in reviewing the totality of the circumstances include the defendant's physical and mental state, the length of questioning, the presence of police coercion or intimidation, and the withholding of food, water, or

other physical needs." *Id.* Finally, "[t]he waiver of *Miranda* rights after being advised of those rights is an important consideration." *State v. Boyle*, 970 S.W.2d 835, 837 (Mo. App. E.D. 1998). "[T]he state is not required to negate every possible fact which could raise an issue as to the voluntariness of a confession." *State v. Clarkston*, 963 S.W.2d 705, 715 (Mo. App. W.D. 1998).

Presumably, Appellant is not complaining about the statements he made after he and his family voluntarily accompanied the officers to the police station in the early-morning hours of August 24. During those interviews, Appellant denied having anything to do with the victim's murder. The police had no evidence connecting either Appellant or his wife, Jada, to the crime, and did not consider either of them to be a suspect.

Appellant contends that the police used "unfounded threats to arrest members of [his] family" and "express threats to take [his] children away" to obtain his confession. Appellant's Brief, p.68. Yet neither proposition is true.

The detectives never threatened to arrest any member of Appellant's family. They simply told Appellant that they might have to re-interview some of his family members. Such an action would have been entirely reasonable considering the significant additional information that they had received concerning Appellant's involvement in the crime since the first interviews. Although Appellant told the detectives to leave his family alone, they suggested that they would if Appellant told the truth about what happened. Suggesting that a suspect tell the truth is not coercive.

Moreover, Appellant does not cite to anything in the record showing that the detectives made "express threats" to take Appellant's children away. Erica had already been placed in her Aunt Phyllis's custody at the time of the first interview. Never during that interview or in any subsequent interview, did the detectives threaten Appellant with taking his children away. In fact, it appears from the record that Appellant did not even know that papers had been filed concerning Erica's custody until after he had left the police station following the August 24th interview. At the time of the second and third interviews, during which Appellant confessed to the crime, the officers did not, and would have no reason to, threaten Appellant with removing Erica from his custody because she was already with Aunt Phyllis's. Moreover, Appellant cites to nothing in the record showing that the detectives said anything to Appellant about removing the remaining two girls from Appellant's custody.

Because Appellant does not allege he was physically threatened or coerced, the issue is simply whether some type of impermissible mental coercion was employed. *See State v. Flenoid*, 642 S.W.2d 631, 634 (Mo. banc 1982). "In determining whether a confession was obtained by mental coercion, 'the age, experience and intelligence of the accused must be considered along with all other circumstances.'" *Id.* Consideration of these factors militates against a finding that Appellant was mentally coerced to confess.

Appellant was a thirty-seven year old St. Louis City corrections officer (Tr. 1802-03). Appellant had worked at both the St. Louis City Jail, a maximum security institution, and a medium security facility (Tr.1804,1975). The rules for being a corrections officer at

the St. Louis City Jail were the same as those in the Missouri Department of Corrections (Tr.1976-77). Appellant handcuffed prisoners and told them what to do (Tr.1862). Appellant worked anywhere he was needed, ran reports, and kept accounts for an entire shift (Tr.1980-81). It is highly unlikely that with this experience, Appellant was even intimidated, much less coerced, by the detectives that questioned him.

Appellant also argues that he invoked his right to counsel before the August 27 interview during which he initially confessed. The only evidence Appellant offers to support this allegation is his own testimony during the defense's presentation of evidence (Tr.1843). Moreover, this testimony was given during an offer of proof, but was never presented to the jury after the trial court decided the jury could hear it following the offer of proof (Tr.1836-49). Appellant never offered any evidence during the hearing on the motion to suppress that he invoked his rights to remain silent and to have counsel present before the August 27 interview. In any event, the trial court was not obligated to believe Appellant's testimony, even if it had been offered during the motion to suppress, and Appellant's execution of a written waiver of his rights to remain silent and to have counsel present belie his contention that he invoked those rights.

Appellant also argues that he invoked his rights to remain silent and to have counsel present on August 26, by faxing a form invoking his right to remain silent to Sergeant Coleman. Again, this evidence was presented through Appellant's own testimony during the defense's case and was offered during an offer of proof, but was never presented to the jury

after the trial court decided the jury would be permitted to hear it (Tr.1836-48). Moreover, this evidence was not offered during the hearing on the motion to suppress.

IV.

The trial court did not abuse its discretion in admitting testimony from the detectives related to their activity surrounding Appellant's co-defendant Orthel Wilson about what actions they took because the record shows that no hearsay statements were offered into evidence in that the State never asked the detectives to testify about what Orthel Wilson told them, to the extent that their responses indirectly revealed Orthel's statements, they were not offered for the truth.

Appellant claims that the State introduced "statements" of Appellant's non-testifying accomplice, Orthel Wilson, the shooter, and that those "statements" implicated Appellant. Appellant argues that this testimony was introduced solely to prove that Orthel confessed to the crime and implicated Appellant. The record simply does not support Appellant's claim.

A. Standard of Review

"The trial court is vested with broad discretion to admit and exclude evidence at trial. Error will be found only if this discretion is clearly abused." *State v. Johns*, 34 S.W.3d 93, 103 (Mo. banc 2000).

B. No Hearsay Was Admitted During Trial

During trial, Sergeant Coleman testified that he and other officers went to Appellant's rental property to verify that he had been there fixing an electrical problem the day before the victim's body was found (Tr.1263). While there, the police interviewed

Orthel Wilson, who was sitting on the steps in front of the rental property (Tr.1264). The police also had information that Appellant and Mr. Wilson knew each other (Tr.1265).

Because Mr. Wilson matched the description of the person the victim's next-door neighbor had seen knocking on the victim's door the day before her body was discovered, the police talked to him and asked him to come back to the police station to be photographed and interviewed (Tr.1264-68). The police also seized a backpack from Mr. Wilson's apartment that matched the description of the backpack the next-door neighbor had seen the person carrying (Tr.1269-70). After the victim's next-door neighbor identified Mr. Wilson from a photographic lineup as the person knocking on the victim's door, the police arrested Mr. Wilson for the victim's murder and interviewed him (Tr.1057-59,1090,1273-74). Sergeant Coleman only confirmed that Mr. Wilson had been interviewed, he offered no testimony as to what Appellant had said (Tr.1274). In fact, the prosecutor cautioned Sergeant Coleman that he could not testify to what Mr. Wilson had said during the interview (Tr. 1274).

Detective Siscel testified that he and Detective Gage talked to Orthel Wilson and that Mr. Wilson led them to a handgun:

Q. Okay. Without telling us what he told you, after you had a conversation with Orthel Wilson, did you go anywhere with him?

A. We went to a location in St. Louis City and recovered a handgun.

(Tr. 1341-42). Appellant did not object to this testimony, but he did object when the prosecutor asked Detective Siscel why they went to that address with Orthel Wilson:

Q. What caused you to go from the University City police station to this specific address which was an abandon [sic] house in the City of St. Louis?

A. Mr. Wilson told us that that's where he hid the murder weapon.

[Appellant's Counsel]: Object, hearsay of Orthel Wilson.

[The Prosecutor]: I'm not offering it for the truth of the matters asserted, only to explain this officer's conduct from going from the University City Police Station to a home on 21st Street in the City–in the City of St. Louis where he had never been before.

The Court: Overruled.

. . . .

Q. (By [The Prosecutor]) Do you recall the question? The question was: What caused you -- how did you know to go from the University City police station to this building on 21st that you had never been to before?

A. Mr. Wilson told us he hid the murder weapon in that vacant building.

Q Is that why you went there?

A Yes.

(Tr.1344-45). Detective Siscel then testified about the gun and ammunition that they found hidden at that address (Tr.1345-48). Later tests confirmed that the victim was shot with the gun the officers recovered (Tr.1589,1591). Detective Siscel then testified that they returned to the police station with Orthel Wilson and decided to interview Appellant, who

was already at the police station (Tr.1349). Appellant objected when Detective Siscel was asked what he and his partner first said to Appellant when the interview began:

Q. Okay. And when you entered the room what was the first thing you said?

A. We informed him we spoke with Mr. Wilson, that he provided us with information that we–

[Appellant's Counsel]: Object to any testimony from this witness as to what Orthel Wilson had to say.

[The Prosecutor]: The question I asked of the detective, former detective, not what Orthel Wilson said to him, but what he said to Kimber Edwards.

[Appellant's Counsel]: If he's relating what he claims Orthel Wilson said, that's the same thing.

[The Prosecutor]: I'm not asking what Orthel Wilson said to him, I'm asking what did he confront Kimber Edwards with.

The Court: He wants to say confronted Mr. Edwards with general information not Mr. Wilson, I will permit that. I won't permit anything that Mr. Wilson said to this officer.

Q. (By [The Prosecutor]) Officer, do you understand that admonition from the Court?

A. Yes, sir.

Q. All right. Generally, what did you confront Mr. Edwards with?

A. The fact that Wilson was in custody, that we had spoken with Wilson and that we had recovered a murder weapon.

(Tr. 1352-53). Detective Siscel testified that after Appellant was informed of his Miranda rights, which he waived, Appellant admitted that he had hired someone named "Michael" to kill his ex-wife (Tr.1356-61). Appellant admitted in his written statement that Orthel Wilson (Theo) had approached Appellant and asked him why Appellant did not hire him to kill his ex-wife (State's Ex. 80C). Appellant's statement also mentioned that after the murder, Orthel Wilson approached Appellant for a bonus claiming that he had taken care of the problem for Appellant (Tr.1375;State's Ex. 80C).

Detective Siscel then testified that he and Detective Gage re-interviewed Orthel Wilson the next day (Tr.1389). After that interview, Detective Siscel testified that they then conducted a second interview with Appellant (Tr.1390). Appellant objected when the prosecutor asked Detective Siscel what he and Detective Gage told Appellant during the interview:

Q. What did you tell him, not what you were told, but what did you tell Mr. Edwards?

A. We told him that we, again, had spoken with Wilson and told Wilson his statement. Wilson told us that he was–

[Appellant's Counsel]: Object to what Orthel Wilson may have said.

The Court: Sustained.

. . . .

[The Prosecutor]: My response -- I'm sorry, my question to him, what did you tell Kimber Edwards, his response would be we told him that Orthel Wilson told us there is no Michael.

The Court: Well, that's hearsay.

[The Prosecutor]: Except–first of all, it's not hearsay because, again, I'm not asking what Orthel Wilson said, it's what did you tell Kimber. You can inquire whether it's true or not, you know there are situations where you mislead people and say our co-defendant purely said -- and the defense attorney can then ask the officer, that wasn't true, was it and the officer has to say, no, yes, it was true, no, it wasn't true. I'm not offering it for the truth. I think it explains the change in the position. If you don't feel comfortable, I'll simply say, did you have a conversation with Kimber concerning the discussion you had with Orthel Wilson and what did Kimber say in response to that?

The Court: I would prefer that. That's fine.

[The Prosecutor]: Well, what I'll do then is, I mean, obviously they know that the police officer went back, had a conversation with Orthel, refers to University City, I'll just–what Ill say is: Without telling us what Orthel Wilson said, did you advise Kimber Edwards that you had a conversation with Orthel Wilson, yes, and what did Kimber Edwards say.

[Appellant's Counsel]: That–that's going to be misleading. That suggests Kimber Edwards on his own is initiating further statements.

The Court: But there is nothing wrong with that question. It's not hearsay.

The Court: I'm going to permit it.

[The Prosecutor]: Okay. I'll be very careful.

. . . .

[The Prosecutor]: Just while we are up here, I think the witness began to answer the question before the objection was raised. If you want to instruct the jury to disregard the last comment, I'm not sure anybody heard that.

The Court: Out of an abundance of caution, I'll do that.

(Proceedings returned to open court before the jury as follows:)

The Court: Ladies and gentlemen, the jury is instructed to disregard the last comment of the witness.

Q. (By [The Prosecutor]) Mr. Siscel, let me go back. You've already told us you that came over to Clayton and had a conversation with Orthel Wilson during the morning of August of–August 28?

A. Yes, sir.

. . . .

Q. After you read that Miranda rights form the second time, did you inform Kimber Edwards that you had had a follow-up conversation with Orthel Wilson?

A. Yes.

Q. Without saying anything that Orthel Wilson said to you, what did Kimber Edwards say to you?

A. He said that he may have left out some information and wanted to give some more details.

(Tr. 1393-98). In Appellant's second statement, he provided more details about Orthel Wilson's involvement with "Michael" and the murder of his ex-wife (Tr. 1398;State's Ex. 81C).

Appellant also objected when Detective Gage was asked about the recovery of the murder weapon:

Q. All right. And when you state directed – you stated that Detective Siscel, Joseph Siscel, who is now retired from the police department --

A. Yes.

Q. – and yourself were directed to a residence. How was it that you came to go to a certain residence?

A. The witnesses we contacted --

[Appellant's Counsel]: Excuse me. May we approach the bench?

(The following discussion was held at the bench outside the hearing of the jury:)

[Appellant's Counsel]: Your Honor, I object to any testimony concerning what Wilson said. My understanding is that what this witness is going to testify to is he went to the location, the gun was recovered, based on what Orthel Wilson told them and it's hearsay and deprives the defendant the right to confront the witnesses against him. In addition, this gun, which the State is going to offer here into evidence shortly–

. . . .

The Court: Very well. That motion will be overruled. What was your first motion?

[Appellant's Counsel]: That this hearing violates the defendant's right to confront the witnesses against him.

The Court: Mr. Sidel.

[The Prosecutor]: Judge, I'm offering the testimony of Detective Gage, which will contain that he received directions on where to go from Orthel Wilson, not for the truth of the matters asserted but to explain why this officer drove from University City police station to an address on 21st Street to a home he had never been to before.

The Court: That objection will be overruled as well.

[Appellant's Counsel]: Can we have a limiting instruction since evidence is coming in for that limited purpose?

The Court: I think the ruling will stand. I don't think the limiting instruction is anymore enlightening to the jury and I think the evidence as it comes in, in my opinion, in a way is sort of self limiting because -- and Mr. Sidel, if you want to state for the record up front of the jury that you are not offering it for the truth of the matters asserted, but only to explain the conduct of the officer.

[The Prosecutor]: Do you want me to do that prior to an objection? In other words, as I'm asking the question, do you want me to include limiting information in the question?

The Court: It would be appropriate.

[The Prosecutor]: Okay. Okay. In other words, I'll make the announcement, the following question to Detective Gage, I'm asking him about who he received directions from, I'm not offering it for the truth of the matters asserted to but to explain your behavior in going to this residence.

The Court: Okay.

(Proceedings returned to open court before the jury as follows:)

Q. (By [The Prosecutor]) Okay. Detective Gage, the next question I'm going to ask will involve who you received directions from to go to a residence on 21st in the City of St. Louis and in asking the question, I'm not offering the truth of what you were told -- I'm not offering the testimony for the truth of the matters asserted but simply to explain your conduct from driving from the University City police station to the residence on 21st Street in St. Louis City. Do you understand that?

A. Yes.

. . . .

Q. (By [The Prosecutor]) Do you recall where you went?

A. Yes.

Q. To a vacant apartment at 3306 21st Street?

A. Yes.

. . . .

Q. Had you ever been to that building in your life?

A. No.

Q. To your knowledge or belief had Detective Siscel ever been to that building before?

A. No.

Q. What was the only reason that you went from University City to this specific building?

A. To recover evidence.

Q. All right. Once you arrived at this residence did you enter?

A. Yes.

Q. Did you enter alone or with other people?

A. With other people.

Q. Who were the other people with you?

A. Detective Siscel and Orthel Wilson.

Q. And within this residence did you find anything secreted?

A. Yes.

Q. What did you find?

A. A plastic bag that contained a handgun.

Q. And how was it within this building that you were able to find this plastic bag containing a handgun?

A. We found it on the direction of Orthel Wilson.

(Tr. 1470-76).

Finally, Appellant complains about Detective Whitley's testimony concerning some cash that Orthel Wilson had in his possession. But the record again shows that no questions were asked about any statements Orthel Wilson may have made (Tr. 1061-65).

C. No Improper Hearsay Testimony Was Admitted

The record shows that during the testimony which he claims was improperly admitted, Appellant mentioned his right to confront witnesses only during his objection to Detective Gage's testimony concerning what the detectives told Appellant before his second interview. Appellant merely raised a hearsay, not a constitutional, claim to the other testimony. "A hearsay objection does not preserve constitutional claims relating to the same testimony." *State v. Parker*, 886 S.W.2d 908, 925 (Mo. banc 1994).

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. *Barnett*, 980 S.W.2d at 306. Although hearsay statements are generally inadmissible, an out-of-court statement not offered for the truth of the matter asserted, but in explanation of conduct, is not inadmissible hearsay. *State v. Baker*, 23 S.W.3d 702, 715 (Mo. App. E.D. 2000). Out-of-court statements that explain subsequent police conduct are admissible as supplying relevant background and continuity. *State v. Dunn*, 817 S.W.2d 241, 243 (Mo. banc 1991). In fact, if the out-of court statement is offered to provide

relevant background to the testimony, as opposed to the truth of the matter asserted, it is not hearsay and is admissible. *State v. Jones*, 863 S.W.2d 353, 357 (Mo. App. W.D. 1993).

Here, the State took great pains to avoid presenting testimony about any of Orthel Wilson's out-of-court statements. The record shows that the detectives never once repeated a statement Orthel made to them. Instead, they simply testified that when they interviewed Appellant they told him that they had talked to Orthel and had recovered the murder weapon. With regard to the recovery of the murder weapon, the detectives testified only that Orthel accompanied them to the vacant building where the gun was recovered.

Appellant's reliance on *Bruton v. United States*, 391 U.S. 123 (1968), is entirely misplaced. *Bruton* holds only that statements of co-defendants are admissible unless the co-defendant is tried together with the accused, incriminates the accused in an out-of-court statement, and declines to testify. *Id.* at 135-37; *see also State v. Isa*, 850 S.W.2d 876, 884 (Mo. banc 1993). *Bruton* does not apply because the State did not try to elicit any of Orthel's statements, and any statements that were indirectly elicited, if any, did not implicate Appellant. *See State v. Clemons*, 946 S.W.2d 206, 226-27 (Mo. banc 1997) (holding that *Bruton* was not violated even though the record contained evidence that a co-defendant made a statement when the "precise contents" of that statement were not admitted, the jury did not hear or read the statement, and the State asked no questions eliciting from any witness details of what the co-defendant said).

Appellant, relying on *State v. Valentine*, 587 S.W.2d 859 (Mo. banc 1979), and related cases, claims that this testimony constituted "inferential hearsay" implicating Appellant in the crime. The *Valentine* line of cases hold that the State may not set up circumstances through a witness's testimony that invites the jury to infer that someone else has identified the defendant as the perpetrator of the crime. *State v. Valentine*, 646 S.W.2d 729 (Mo. banc 1983). Consequently, testimony that, by inference, suggests that the defendant was identified by the victim, an accomplice, or some third party, violates the hearsay rule if it is offered for its truth. *Valentine*, 587 S.W.2d at 861-62.

Here, the detectives' testimony did not violate the "inferential hearsay" rule because the testimony was not offered for its truth and it set up no circumstances suggesting that Appellant committed the crime. If, for example, the detectives had testified that they arrested Appellant for murder immediately after talking with Orthel, then Appellant would have the makings of an "inferential hearsay" claim. Instead, the detectives simply testified that after they talked to Orthel, they interviewed Appellant, who then confessed to the crime.

To the extent that any of this testimony was objectionable, including the testimony that Orthel said he had hid the murder weapon in the vacant building, Appellant was not prejudiced. The testimony that Orthel hid the murder weapon in the vacant building did not implicate Appellant, and other evidence apart from this testimony established that the gun the detectives recovered was, in fact, the murder weapon (Tr. 1589-91).

Appellant's general claim of prejudice is that this testimony was used to show that he was involved in the crime. In other words, Appellant claims that this testimony implies that Orthel told the police that Appellant was involved in the murder. The major obstacle to this claim, however, is that Appellant himself confessed to the crime. *See Clemons*, 946 S.W.2d at 206 (holding that it was unnecessary to consider whether indirect testimony of a co-defendant's statement was admitted because the defendant was not prejudiced because the defendant confessed to police that he was present when the victims were murdered).

Finally, although not considered by the trial court, it would appear that evidence of Orthel's statements to police, if any appear in the record, were admissible under the co-conspirator exception to the hearsay rule. *See State v. Clay*, 975 S.W.2d 121, 131 (Mo. banc 1998).

V.

The trial court did not err in refusing to submit to the jury Appellant's proposed no-adverse-inference instruction during the penalty phase because that instruction was not in proper, was misleading, and would have confused the jury in that Appellant's proposed instruction suggested to the jury that Appellant had never testified at trial when, in fact, Appellant had testified during the guilt phase, but not the penalty phase.

Appellant contends that the trial court erred in refusing to give the jury his proposed no-adverse inference instruction during the penalty phase. But the trial court did not err in refusing to give Appellant's proposed instruction because it was misleading and would have confused the jury. Even if Appellant's claim is considered under the plain error standard, the record shows that Appellant suffered no manifest injustice in the trial court's refusal to give a no adverse inference instruction. Finally, to the extent that Appellant's claim is preserved, the trial court's refusal to give the instruction was harmless beyond a reasonable doubt.

A. Appellant's Proposed No-Adverse-Inference Instruction

Appellant took the stand in his own defense during the guilt phase and testified that he did not cause anyone to kill his ex-wife, Kimberly Cantrell (Tr. 1851). The jury obviously disbelieved this testimony and found Appellant guilty of first-degree murder (L.F. 481). During penalty-phase opening statements, Appellant's counsel told the jury that he accepted the jury's guilty verdict, but that he knew the jury would "understand how hard

that must be after having argued for [Appellant's] innocence" (Tr. 1926). Appellant did not testify during the penalty phase (Tr. 1936-2030). Consequently, during the penalty-phase instruction conference, Appellant proposed that the jury be given the following no-adverse inference instruction:

> Under the law, a defendant has the right not to testify. No presumption may be raised and no inference of any kind may be drawn from the fact that the defendant did not testify.

(L.F. 492). The trial court noted that Appellant's proposed instruction was simply a modification of the guilt-phase no-adverse inference instruction (MAI-CR3d 308.14) and concluded that this instruction applied only to the guilt phase (Tr.1988-89). As a result, the trial court refused Appellant's proposed instruction.

Nothing in the record shows that Appellant made the trial court aware of either MAI-CR3d 313.30A, Notes on Use 4, which specifically provides that certain guilt-phase instructions, including the no-adverse-inference instruction (MAI-CR3d 308.14), may be modified and used during the penalty phase, or this Court's decisions in *State v. Storey*, 986 S.W.2d 462 (Mo. banc 1999) or *State v. Mayes*, 63 S.W.3d 615 (Mo. banc 2002), both of which hold that a modified no-adverse-inference instruction should be given during the penalty phase, if the defendant requests it. This Court's opinions in both cases were handed down before Appellant's case went to trial. But Appellant's counsel did cite both of these cases in his motion for new trial filed only twenty-five days after the penalty-phase instruction conference (L.F. 10, 561-63).

B. Appellant's Proposed Instruction Was Improperly Worded

Appellant, relying on *Storey* and *Mayes*, contends that the trial court erred in not giving his proposed instruction and that this error was not harmless. Appellant, however, fails to address an issue expressly left unresolved by this Court: Whether his proposed instruction was properly worded. The wording of the penalty-phase no-adverse inference instruction was not an issue in *Storey*. *Storey*, 986 S.W.2d at 464 ("The State concedes that the modified instruction was an accurate statement fo the law . . . ."). And in *Mayes*, this Court expressly stated that it was not considering the propriety of the no-adverse-inference instructions the defendant offered in that case:

> Because, on appeal, the State does not raise any issue as to the wording of the offered instructions, but argues only that it was not prejudicial to refuse to give an adverse inference instruction in the penalty phase, the Court does not address the propriety of the wording of either alternative instruction offered by Defendant.

Mayes, 63S.W.3d at 634 n.8.

As mentioned above, certain guilt-phase instructions, including the no-adverse inference instruction (MAI-CR3d 308.14), may be modified and given to the jury during the penalty phase upon the defendant's request. MAI-CR3d 313.30A, Notes on Use 4. But this note contains a cautionary statement that "[i]f any such instructions are appropriate, they should be modified to properly reflect the law and circumstances as they exist in the second stage proceedings." *Id.* The wording of Appellant's proposed instruction failed to properly reflect the circumstances that existed in this case.

Appellant's proposed instruction expressly tells the jury that it may make no presumption or draw any adverse inference "from the fact that the defendant did not testify." The problem is that Appellant did testify before the jury during the guilt phase. The wording of Appellant's proposed instruction was at best vague and incomplete. This instruction would have likely confused the jury by telling them that it could draw no inference from the fact that Appellant did not testify when the jury knew that he had already testified before them. Without some direct reference to the fact that Appellant had a right not to testify during the penalty phase and that the jury may not draw any inference as to punishment, Appellant's proposed instruction would have only confused and misled the jury.

This confusion would have only been compounded considering the other penalty-phase instructions the jury was given. Instruction No. 18, patterned after MAI-CR3d 313.41A, told the jury that in deciding whether the facts and circumstances in aggravation of punishment as a whole warrant imposition of a death sentence, it "may consider all of the evidence presented in both the guilty [sic] and punishment stages of trial" (L.F.486). Instruction No. 19, patterned after MAI-CR3d 313.44A, told the jury that in determining whether the facts and circumstances in mitigation of punishment outweigh those in aggravation of punishment, it "may consider all of the evidence presented in both the guilt and punishment stages of trial" (L.F.487). Instruction No. 20, patterned after MAI-CR3d 313.46A, told the jury that it "must consider *all* the evidence in deciding whether to assess and declare the punishment at death" (L.F.488) (emphasis added). Instruction No. 21,

patterned after MAI-CR3d 313.48A, told the jury that in considering the punishments of either death or life imprisonment without parole, it must consider "all of the evidence and instructions of law given to" it (L.F.489).

Potential juror confusion would have resulted because the jury was repeatedly instructed to consider all the evidence from both the guilt and punishment phases in assessing punishment. This would have included the testimony Appellant gave in the guilt phase. Yet, Appellant's proposed instruction would have told the jury that it may not draw any inference from the fact that Appellant did not testify. Not only was this factually incorrect because Appellant did testify, it was also an improper statement of the law because the jury was permitted to consider Appellant's guilt-phase testimony as evidence in both aggravation and mitigation of punishment.

Because the wording of the penalty-phase no-adverse inference instruction would have potentially confused and misled the jury, the trial court did not clearly err in refusing to give the instruction. Jury instructions should not be confusing, misleading, or ambiguous. *See State v. Levesque*, 871 S.W.2d 87, 90 (Mo. App. E.D. 1994). If a proffered instruction is "improper because [it] is confusing or incorrect, the trial court is fully justified in refusing" to give it. *State v. Healey*, 562 S.W.2d 118, 131 (Mo. App. St L.D. 1978). A trial court does not commit error by rejecting an instruction that either misstates the law or would have confused the jury. *State v. Derenzy*, 89 S.W.3d 472, 475 (Mo. banc 2002) (holding that the trial court did not err in refusing the defendant's

proposed lesser-included offense instruction that did not accurately describe the charged offense); *see also State v. Parkhurst*, 845 S.W.2d 31, 37 (Mo. banc 1992).

Finally, the trial court's stated reason for refusing Appellant's proposed instruction, which was contrary to this Court's holdings in *Storey* and *Mayes*, was inconsequential. If the trial court was correct in refusing the instruction for any reason, it's ruling will be upheld. *See State v. White*, 936 S.W.2d 793, 794 (Mo. banc 1997). "This is true even if the reason stated was inadequate or incorrect." *Id.* Here, the trial court's rejection of Appellant's proposed instruction was proper because, as demonstrated above, that instruction inaccurately stated the law and would have potentially confused and misled the jury.

C. Failing To Correct The Proposed Instruction Was Not Plain Error

"Appellant's failure to submit a correct instruction under these circumstances renders his claim[] of error unpreserved. He has therefore waived Rule 28.03 review of [this] point." *Derenzy*, 89 S.W.3d at 475. Consequently, "Appellant's failure to submit a correct instruction waived all but plain error review of [this] point." *Id.* at 474. The trial court's failure to correct Appellant's instruction and submit the corrected version to the jury did not constitute plain error.

1. Standard of Review

"Instructional error seldom rises to the level of plain error." *State v. Wright*, 30 S.W.3d 906, 912 (Mo. App. E.D. 2000). For instructional error to be plain error, the defendant must show more than mere prejudice; he must "establish that the trial court has

so misdirected or failed to instruct the jury that it is apparent to the appellate court that the instructional error affected the jury's verdict." *Wright*, 30 S.W.3d at 912.

2. Appellant Suffered No Manifest Injustice

The defendant has the option of requesting that the no-adverse-inference instruction be submitted to the jury. "[W]hen a defendant does not testify in the penalty phase of a capital murder trial, the court must give a 'no-adverse-inference' instruction if the defendant so requests." *Storey*, 986 S.W.2d at 464; *see also* MAI-CR3d 308.14, Notes on Use 2. "Defendants have a right to the no-adverse-inference instruction, *upon request*. The instruction is not mandatory." *Knese v. State*, 85 S.W.3d 628, 634 (Mo. banc 2002) (emphasis in original) (citation omitted). The fact that this instruction is optional, militates against a finding that Appellant suffered manifest injustice by the trial court's failure to correct his erroneous instruction and submit a correct version to the jury. In *Knese*, an ineffective assistance of counsel case, this Court held that counsel made a reasonable trial strategy decision not to request the no-adverse-inference instruction during the guilt phase of a capital murder case "given the extensive confessions admitted at trial." *Id.*

In addition, the MAI-CR does not provide the wording of the instruction to be given in the penalty phase of a capital murder trial when the defendant has testified in the guilt phase. It simply provides that the general no-adverse-inference instruction (MAI-CR3d 308.14) be modified "to properly reflect the law and circumstances as they exist in the second stage proceedings." MAI-CR3d 313.30A, Notes on Use 4. Because the instruction is given only if the defendant requests it, it is incumbent on the defendant to prepare a

properly worded instruction and submit it to the court. Moreover, because the wording of the instruction must "properly reflect the law and circumstances" as they exist during the penalty phase, the wording of the instruction may vary depending on the circumstances. It should be the defendant's responsibility to ensure that the wording is proper in any particular case. It should not be the trial court's primary responsibility to draft a properly worded instruction or to correct an erroneous instruction submitted by the defendant.

Appellant suffered no manifest injustice, because the failure to give a no-adverse-inference instruction during the penalty phase did not affect the jury's verdict under the circumstances of this case. Appellant took the stand during the guilt phase and denied having anything to do with the murder of his ex-wife (Tr.1851,1868-69). In addition, he presented evidence and argued during the guilt phase that his confession to police that he paid $1600 for his ex-wife's murder was coerced. After the jurors found Appellant guilty of a murder despite his protestations of innocence and his claim that his confession was coerced, they certainly did not expect Appellant to take the stand during the penalty phase and express remorse for his having been involved in his ex-wife's murder. In other words, the jury fully expected Appellant to not testify during the penalty phase, and it would have had no reason to draw any adverse inferences from the fact that he did not.

Indeed, for Appellant to have done so not only would have been disingenuous, since he claimed during the guilt phase that he was innocent, it would have appeared to the jury that Appellant would say anything to avoid responsibility for his crime and likely would have turned the jury even more against him. Appellant recognized this potential when his

counsel stated during penalty-phase opening statements that he knew the jury would understand how hard it was for Appellant and his attorneys to accept the verdict after they had argued for Appellant's innocence (Tr.1926).

Appellant made a trial-strategy decision to argue that he was innocent of the murder charge and that his confession was coerced, rather than accepting responsibility for his crime and asking for leniency. This decision controlled whether the jury's verdict was affected by the failure to give the no-adverse-inference instruction. Because the jury heard Appellant claim he was innocent, they would have drawn no adverse inference from the fact that he did not testify during the penalty phase. If during the guilt phase, Appellant had either not testified or had testified that he had accepted responsibility for his crime, then Appellant would have had a more plausible argument that the failure to give the no-adverse-inference instruction during the penalty phase affected the jury's verdict. But under the circumstances of this case, the failure to give the instruction did not affect the jury's verdict.

Appellant makes much of the fact that during penalty-phase closing arguments the prosecutor stated that the jurors had heard nothing about Appellant expressing remorse to anyone about his ex-wife's murder (Tr.2031). This statement was made immediately after Appellant had called nine character witnesses, none of whom testified that Appellant had expressed any remorse (Tr. 1937-2030). The prosecutor's statement in this context was mere tautology in that the jury already understood that Appellant would not have expressed

remorse to anyone considering the fact that Appellant claimed he was innocent of the crime.

D. Failing To Give Appellant's Instruction Was Harmless Error

Even if this Court holds that Appellant's instruction was properly worded and that he has preserved this claim for appellate review, the analysis outlined above also demonstrates that the trial court's failure to give the instruction was harmless beyond a reasonable doubt.

In *Storey*, this Court held that "the failure to give a requested, no-adverse-inference instruction is subject to harmless-error review." *Storey*, 986 S.W.2d 464. An otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt. *See State v. Duncan*, 945 S.W.2d 643, 649 (Mo. App. S.D. 1997); *Chapman v. California*, 386 U.S. 18, 24 (1967). In determining whether error is harmless, this Court should consider the circumstances of the error and the quality of the evidence in support of the verdict. *State v. Samuels*, 965 S.W.2d 913, 920 (Mo. App. W.D. 1998).

Although in both *Storey* and *Mayes* this Court held that the failure to give the no-adverse-inference instruction during the penalty phase was not harmless error, Appellant's case is distinguishable. In both *Storey* and *Mayes*, the jury did not hear the defendants testify during the guilt phase. Although the *Mayes* court, in describing the facts in the *Storey*, stated that the defendant in that case had testified in the guilt phase, this is an incomplete description of the circumstances in *Storey*. While the defendant in *Storey* did testify in the guilt phase of his original 1991 trial, this Court's decision regarding the

failure to give the no-adverse-inference instruction during the penalty phase involved only the 1997 retrial of the defendant's penalty phase. *Storey*, 986 S.W.2d at 463-64. In the penalty-phase retrial, the defendant did not testify and the jury heard no testimony from Appellant's guilt-phase testimony in his original 1991 trial. *Id.*

As mentioned above, the circumstances of the court's failure to give the instruction in this case shows that Appellant was not prejudiced. Again, Appellant testified during the guilt phase and claimed that his confession was coerced and that he was innocent of the crime. The jury had no expectation of hearing Appellant testify in the penalty phase that he was remorseful for his crime because Appellant had already told the jury he was innocent. The jury could not have drawn any adverse inference from Appellant's failure to testify in the penalty phase, because they knew Appellant believed he was innocent. In fact, Appellant's case would have likely been adversely affected if he had testified during the penalty phase and expressed remorse for a crime that he claimed he did not commit. Moreover, the giving of the no-adverse-inference instruction during the penalty phase would have only highlighted the fact that Appellant had not testified during the penalty phase and would have only reminded the jury of Appellant's guilt-phase testimony and that an adverse inference that could be drawn from his failure to testify during the penalty phase, even though they would have been instructed not to draw any such inferences.

The record also contains strong evidence of Appellant's guilt. Although the jury found only one statutory aggravating circumstance, that finding was supported not only with evidence linking Appellant with Orthel Wilson, who was identified as being at the victim's

apartment near the time she was killed, but also Appellant's confession to police in which he admitted that he had paid someone to have his ex-wife murdered.

Finally, the record also shows that during voir dire, the veniremembers were informed that they could not consider Appellant's failure to testify in deciding the case (Tr.833-43).

Courts in other states have held that the failure to give a no-adverse-inference instruction under circumstances similar to the ones in Appellant's case can constitute harmless error.

In *Breathard v. State*, 767 S.W.2d 423 (Tex. Crim. App. 1989), the defendant testified during the guilt phase of his capital murder trial and denied his complicity in the murders with which he was charged. *Id.* at 426. Although the defendant did not testify during the penalty or punishment phase, the trial court refused to give the jury a no-adverse-inference instruction concerning Appellant's failure to testify during the punishment phase. *Id.* at 431. The court noted that "[t]he right to a 'no-adverse-inference' instruction is rooted in a jury's natural tendency to assume that the decision not to testify stems from a defendant having something to hide. *Id.* at 432; *see also Carter v. Kentucky*, 450 U.S. 288, 302-04 (1981). The court concluded that the error was harmless because the jury, having heard the defendant testify during the guilt phase, would not have expected him to testify during the punishment phase:

> By testifying during guilt/innocence, the jury heard numerous things from the appellant. In addition, the State presented no evidence at the punishment phase.

> Thus, appellant was not placed in a position where the jury would expect him to counter factual assertions made by the State. In fact, if the jury was to draw any improper inference from a failure to present a case, it would have been made against the State. Appellant did, however, call six witnesses. Limited to the unusual factual setting of this case, we find that the trial judge's error in failing to give a "no-adverse-inference" instruction was, beyond a reasonable doubt, harmless.

Breathard, 767 S.W.2d at 432-33. The Fifth Circuit, which considered this issue after the defendant in *Breathard* appealed a federal district court's denial of his application for a writ of habeas corpus, held that the trial court's failure to give the instruction was harmless. *See Breathard v. Johnson*, 177 F.3d 340, 350 (CA5 1999).

The same analysis applies here. The jury did not expect Appellant to testify during the penalty phase when he testified during the guilt phase that he was innocent of the crime. Moreover, the State presented only two victim-impact witnesses, the victim's sister and brother, during the penalty phase, and their testimony spanned only seven transcript pages (Tr. 1930-36). These two witnesses made no factual assertions that the jury would have expected Appellant to refute. In fact, Appellant asked only two cross-examination questions of one witness and did not even cross-examine the other one (Tr.1933,1936). Appellant, on the other hand, presented nine character witnesses and showed the jury a video about Potosi Correctional Center (Tr.1937-85). *See also Burns v. State*, 699 So.2d 646, 652 (Fla. 1997) (holding that the failure to give a no-adverse-inference instruction during a penalty-phase only retrial of defendant's capital murder case was harmless error);

James v. Commonwealth, 679 S.W.2d 238, 240 (Ky. 1984) (holding that the failure to give a no-adverse inference instruction during the penalty phase of the trial was harmless because of the overwhelming evidence of guilt).

To the extent that Appellant's claim of error under this point was preserved, the trial court's failure to give a no-adverse-inference instruction during the penalty phase was harmless error.

VI.

The trial court did not err in submitting Instruction No. 17 (statutory aggravating circumstances) to the jury or sentencing Appellant to death because the record contains sufficient evidence from which a reasonable juror could find that the State proved the statutory aggravating circumstance found by the jury in that the record contains sufficient evidence independent of Appellant's confession to prove that Appellant hired Orthel Wilson or someone named "Michael" to kill the victim.

Appellant contends that the statutory aggravating circumstance found by the jury was unsupported by sufficient evidence. Appellant claims that his confession was the only evidence supporting that aggravating circumstance. Consequently, Appellant urges this Court to adopt a modified "corpus delicti" rule requiring that a statutory aggravating circumstance be proved by evidence independent of a defendant's extra-judicial statements. This Court need not consider Appellant's request for such a rule, because the record contains sufficient evidence independent of Appellant's confession that he hired Orthel Wilson to kill the victim.

A. Standard of Review

When a defendant challenges the sufficiency of the evidence to support a statutory aggravating circumstance, the test is wether a reasonable juror could reasonably find from the evidence that the proposition advanced is true beyond a reasonable doubt. *See Clay*, 975 S.W.2d at 145; *State v. Kinder*, 942 S.W.2d 313, 332 (Mo. banc 1996). In reviewing challenges to the sufficiency of evidence under these circumstances, "this Court accepts as

true all evidence favorable to the state, including all favorable inferences drawn form the evidence." *Kinder*, 942 S.W.2d at 332.

B. The Record Supports The Aggravating Circumstance

The jury found the following statutory aggravating circumstance beyond a reasonable doubt: "Whether the defendant hired Orthell Wilson and/or a person known only as Michael to murder Kimberly Cantrell" (L.F.494). Although the only evidence that Appellant hired a person named "Michael" to kill his ex-wife came from Appellant's confession, the record contains sufficient evidence independent of that confession that Appellant hired Orthel Wilson to kill the victim.

Appellant does not contend that there was insufficient evidence in the record for a reasonable juror to find this statutory aggravating circumstance beyond a reasonable doubt. Indeed, Appellant confessed that he not only hired someone named "Michael" to kill his ex-wife, but that Orthel Wilson was involved in the murder and approached Appellant wanting to get paid for committing the crime.

Appellant argues instead that his confession is the only evidence that proves this aggravating circumstance. This assertion, however, is simply incorrect. The record contains sufficient evidence independent of that confession to establish the "corpus delecti," assuming that proof of one is necessary, of the statutory aggravating circumstance the jury found in this case.

Hughie Wilson, Orthel's brother, testified that during the Spring or Summer of 2000, Appellant asked Hughie if he knew where he could get a "throwaway" gun or "burn,"

which is a gun that is used once and thrown away (Tr.1619,1651-52). Hughie, who also had worked for Appellant at the apartment complex, lived in the apartment before his brother Orthel moved there in June 2000 (Tr.1600,1604).

On or about August 7, 2000, Hughie was visiting his brother Orthel at the Palm Street apartment (Tr.1612). While there, Hughie saw a .38 caliber handgun sitting on a table in Orthel's bedroom (Tr.1612-14). This gun looked similar to the gun that was used to kill the victim (Tr.1615). Appellant and Orthel were in the room with the gun when Hughie arrived (Tr.1613-14). After Hughie entered the room, Appellant told Orthel to put the gun away, which he did (Tr.1614).

During August 2000, Orthel lived in the Palm Street apartment with Donnell Watson (Tr.1421). Mr. Watson testified that on August 21, 2000, Appellant visited Orthel at the apartment sometime after 8 p.m. (Tr.1428). The next day (August 22, 2000), Mr. Watson drove Orthel their place of employment (Tr.1424,1430). After work, Orthel asked Mr. Watson to drop him off at Midland and Olive, which was 200 to 300 yards from the victim's apartment (Tr.1436,1279). Mr. Watson dropped Orthel off at that intersection at 4:30 p.m. (Tr.1438).

Mr. Watson said that Orthel returned home at 7:30 p.m. looking sweaty (Tr.1439-40). At 8 p.m., or shortly thereafter, Appellant came to the apartment to see Orthel (Tr.1440-46). Orthel's voice was raised while he talked to Appellant (Tr.1446-47). On August 24, 2003, while Orthel and Mr. Watson were watching the local evening news, Orthel stopped their conversation in mid-sentence and turned his attention toward a

television report about an incident in University City (Tr.1448-49). Mr. Watson said that Orthel became very nervous and started sweating after watching that story (Tr.1448-49).

C. The State Proved The "Corpus Delicti"

Assuming, for the sake of argument, that the corpus delecti of a statutory aggravating circumstance must be established independent of a defendant's confession, the record here, contrary to Appellant's claim, contains such proof.

Generally, out-of-court confessions are not admissible unless they are corroborated by evidence showing the corpus delicti of the crime. *See State v. Fears*, 803 S.W.2d 605, 608 (Mo. banc 1991); *State v. Benton*, 812 S.W.2d 736, 740 (Mo. App. W.D. 1991). "The corpus delicti consists of two elements: '(1) proof, direct or circumstantial, that the specific loss or injury occurred, and (2) someone's criminality as the cause of the loss or injury.'" *Benton*, 812 S.W.2d at 740, *quoting State v. Friesen*, 725 S.W.2d 638, 639 (Mo. App. W.D. 1987). "Full proof of the corpus delicti independent of [a] defendant's extrajudicial confession is not required." *State v. Garrett*, 829 S.W.2d 622, 626 (Mo. App. S.D. 1992). "If there is evidence of corroborating circumstances independent of the confession, which tends to prove the offense by confirming matters related in the confession, both the corroborating circumstances and the confession may be considered in determining whether or not the corpus delicti has been established." *State v. Evans*, 992 S.W.2d 275,285 (Mo. App. S.D. 1999). "Only slight corroborating facts" are necessary to establish the corpus delicti. *Id.*

Here, the record contains more than "slight corroborating facts" to prove the corpus delecti of the statutory aggravating circumstance independent of Appellant's confession. Appellant attempted to procure a gun from Orthel's brother a few weeks before the murder. Orthel, who was seen near the victim's apartment at the time she was likely murdered, worked for Appellant and lived rent-free in one Appellant's apartments. Orthel's brother, Hughie, saw a gun similar to the one used to kill the victim in Orthel's bedroom while Appellant was present approximately two weeks before the murder. Orthel and Appellant met both the evening before and immediately after the murder was committed.

Curiously, Appellant's Brief seemingly concedes that evidence independent of Appellant's confession existed to show that Appellant hired Orthel Wilson to kill his ex-wife. In Point XI of his Brief, Appellant complains about the trial court's refusal to grant him a continuance to locate a witness to impeach or rebut the testimony of "Donnell Watson, through whom the state attempted to link Orthel and [Appellant] in a plot to kill [the victim]." Appellant's Brief, p.124. If, as Appellant claims in this Point, the State presented no evidence independent of Appellant's confession showing that he had hired Orthel Wilson to kill the victim, then why is he arguing in Point XI that a continuance was necessary so he could locate a witness to impeach Mr. Watson's testimony linking Appellant and Orthel Wilson?

Because the basic premise of Appellant's claim, that the State presented no evidence other than Appellant's confession to prove the statutory aggravating circumstance, is incorrect, this Court should reject that claim. Moreover, the record contains sufficient

evidence from which the jury could find the statutory aggravating circumstance beyond a reasonable doubt. Finally, to the extent that the State must prove the corpus delicti of a statutory aggravating circumstance independent of a defendant's confession, the State carried its burden here.

VII.

The trial court did not plainly err or abuse its discretion in allowing evidence that Appellant had failed to plead guilty and accept the State's plea bargain in the criminal non-support case because this was not inadmissible evidence of prior uncharged crimes or bad acts in that the charge and his subsequent failure to plead guilty was evidence of his motive to commit the murder, and refusing to plead guilty or accept a plea bargain is not a "bad act."

Appellant argues that the trial court abused its discretion in overruling his objections to "repeated statements about [Appellant's failure to plead guilty to criminal non-support." Appellant's Brief, p.99. The apparent thrust of Appellant's complaint is that this constituted inadmissible evidence of other crimes. Appellant's claim is without merit because Appellant's failure to plead guilty to the non-support charge and accept the State's plea bargain was evidence of his motive to kill the victim. Also, the failure to plead guilty is not a "bad act" or an "uncharged crime."

A. Standard of Review

Plain errors may be considered in the discretion of the court when the court finds that manifest injustice or a miscarriage of justice has resulted therefrom. Rule 30.20. The plain error rule should be used sparingly and does not justify a review of every alleged trial error that has not been properly preserved for appellate review. *State v. Hibler*, 21 S.W.3d 87, 96 (Mo. App. W.D. 2000). A plain error is one that "must impact so substantially upon

the rights of the defendant that manifest injustice or a miscarriage of justice will result if uncorrected." *State v. Driscoll*, 711 S.W.2d 512, 515 (Mo. banc 1986).

Moreover, the trial court is vested with broad discretion to admit and exclude evidence at trial. A trial court will be found to have abused its discretion only when a ruling is "clearly against the logic and circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." *State v. Brown*, 939 S.W.2d 882, 883-84 (Mo. banc 1997). On direct appeal, this Court reviews the trial court "for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial." *State v. Morrow*, 968 S.W.2d 100, 106 (Mo. banc 1998).

B. The Evidence Relating To Appellant's Non-Support Charge

The State argued that part of Appellant's motive for having his ex-wife killed was to avoid the prospect of accepting a plea bargain that would have required him to pay a lump-sum and increased monthly child-support payments to cover his arrearage (Tr.1881). To support its theory, the State offered evidence that Appellant had been charged with criminal non-support (Tr.1665-70). Appellant apparently concedes that the fact that he was charged was relevant evidence, but contends that evidence that Appellant had not pleaded guilty or accepted the State's plea bargain was not. Appellant's Brief, p.101-02.

During trial, the State offered evidence that Appellant had been offered a plea bargain in the non-support case of a suspended imposition of sentence and five years probation under the conditions that he make a lump-sum payment of $1500 and that his child support payment be increased to $500 per month to cover his arrearage (Tr.1687-88). The evidence also showed that a scheduling conference, or court appearance, was scheduled for August 25, 2000 (Tr.1673-74). In his brief, Appellant specifically complains about testimony that he did not plead guilty to the non-support charge at the August 25 court appearance, and, by inference, had not accepted the State's plea offer.

The problem with Appellant's claim is that the grounds on which he objected at trial are not the same grounds he has advanced on appeal:

> Q. But he did not take that offer on August the 25th.
>
> [Appellant's Counsel]: Object. Mr. Edwards was arrested and busy fighting for his life at -- at that point, being called in for questioning.
>
> The Court: Overruled.
>
> . . . .
>
> Q. (By [The Prosecutor]) Again on August 25th, the date that Douglas Richards and you both agreed, if it was going to be a plea to an SIS, fifteen hundred dollars paid at the time and five hundred dollars a month, every month thereafter for sixty consecutive months, on August – you've already seen a memo, it was continued from that date; is that correct?
>
> A. Yes.

. . . .

Q. So, again, on that date, August 25th, and Mr. Edwards was not in custody that date, August 25th of 2000, even though his lawyer had previously said to you, when he came to court, Kimber Edwards came to court on August 25th of 2000 he did not plead guilty?

A. No.

Q. He did not plead guilty?

A. He did not.

[Appellant's Counsel]: Your Honor, I'm going to object. There is a lot of things wrong with the question. One is Mr. Sidel has just stated that there were -- was an agreement by the attorneys and by Mr. Edwards attorney that this might be a plea and that was documented in some of the exhibits also.

The Court: What's the legal objection?

[Appellant's Counsel]: Legal objection this is beyond the scope of cross and that there are factual inaccuracies in the question.

The Court: Overruled.

A. No, he did not plead.

Q. (By [The Prosecutor]) Even though the offer was still available to him?

A. Yes, the offer was still available to him on that date.

(Tr.1705-07).

Aside from the fact that counsel objected substantially after the question was asked, Appellant failed to preserve his claim on yet another ground. His motion for new trial asserts a claim of error with respect to a different question than the one identified in his brief:

> The Court erred in allowing the State, over defense objections, to repeatedly ask witness Andrew Lange to speculate as to possible consequences to Kimber Edwards were Mr. Edwards to enter and default on a proposed plea agreement in the criminal non-support case.

(L.F.549). On appeal, Appellant complains only that the trial court allowed evidence that Appellant had not pleaded guilty.

C. Failing To Plead Guilty Was Evidence of Motive

Whether preserved or not, Appellant's claim has no merit. Appellant's argument that this is inadmissible evidence of "other crimes" is incorrect. The Missouri Supreme Court has expressly recognized the use of "other crimes" when related to proof of the elements of the crime charged. *State v. Skillicorn*, 944 S.W.2d 877, 887 (Mo. banc 1997); *See also State v. Kenley*, 693 S.W.2d 79, 81-82 (Mo. banc 1985). "Conduct before and after the commission of the charged crime is relevant where it relates to the elements of the charged crime." *Id.* This is especially true when the evidence relates to the mens rea of the crime charged. *Id.*

Although the fact that Appellant was charged with non-support was relevant, it was not conclusive proof of motive. Without a showing that the non-support case was still

pending, the evidence of motive related to that case is weaker. Moreover, other evidence showed that Appellant had filed multiple actions to lower his child support payments (Tr.1327-32). His failure to plead guilty and to agree to pay $1500 and to permit an increase in his monthly child support to cover his arrearage is consistent with his efforts to avoid paying child support. Refusing to plead guilty and choosing to murder his ex-wife accomplished this goal.

D. Failure To Plead Guilty Or To Accept A Plea Bargain Is Not A "Bad Act"

In addition, Appellant's refusal to plead guilty to a criminal charge is not evidence of bad acts or "prior uncharged crimes." Although this evidentiary doctrine is not strictly limited to evidence of criminal acts, neither does it apply to all possible evidence concerning a defendant:

> [A]lthough the term "crime" is used, neither a prior conviction nor a charge is required; the principles cover any wrongdoing that could have been the subject of a criminal charge and probably covers *other wrongful acts and conduct to the extent that it conveys to the jury the type of prejudice that accompanies a disclosure that the defendant has engaged in criminal conduct*.

State v. Sladek, 835 S.W.2d 308, 313 n.1 (Mo. banc 1992) (Thomas, J., concurring) (emphasis added); *see also State v. Cole*, 887 S.W.2d 712, 714 n.2 (Mo. App. E.D. 1994). In *State v. Bernard*, 849 S.W.2d 10 (Mo. banc 1993), this Court confirmed that the application of the rule on evidence of other crimes required, at the very least, a wrongful act by the defendant:

> The general rule concerning the admission of uncharged crimes, wrongs, or acts is that evidence of *prior uncharged misconduct* is inadmissible for the purpose of showing the propensity of the defendant to commit such crimes.

Id. at 13 (emphasis added; citation omitted).

The principal danger of evidence of other crimes and uncharged misconduct–and the reason for more stringent limitations upon its admissibility–is the tendency of such evidence to raise "a legally spurious presumption of guilt in the minds of the jurors." *State v. Reese*, 274 S.W.2d 304, 307 (Mo. 1954); *see also Bernard*, 849 S.W.2d at 16. In the relatively rare instances in which the rule on evidence of other crimes has been applied to noncriminal conduct, the acts in question have generally been "misconduct" or "bad acts" that could lead the jurors to infer that the defendant was likely to commit crimes. In other cases, courts have not applied the evidence of other crimes doctrine to acts that were not criminal because they were not misconduct or because no such inference of propensity existed. Appellant's failure to plead guilty to the non-support charge was not, by any definition, either an uncharged crime , "misconduct," or a wrongful act. Evidence that Appellant did not plead guilty certainly did not in any way suggest that he had a propensity to commit criminal offenses, especially first-degree murder.

E. The Evidence Was Logically and Legally Relevant

Applying general principles of relevance of evidence, the trial court did not abuse its discretion in admitting evidence that Appellant had not pleaded guilty or accepted the State's plea bargain. "Evidence is relevant if it tends to prove or disprove a fact in issue, or

if it corroborates evidence that is relevant and bears on a principal issue." *State v. Malone*, 951 S.W.2d 725, 730-31 (Mo. App. W.D. 1997) (citation omitted). The evidence in this case meets that test.

Even if the legal principles governing evidence of other crimes were applicable to this evidence, contrary to the principles and authorities discussed above, Appellant's refusal to plead guilty and accept a plea bargain requiring him to pay large sums was also logically and legally relevant as defined in *State v. Bernard*. This evidence had "some legitimate tendency to establish directly the accused's guilt of the charges for which he is on trial." *Bernard*, 849 S.W.2d at 13. Since this evidence in no way suggested that appellant had a propensity to commit crimes, especially violent ones, "its probative effect outweigh[ed] its prejudicial value." *Id.*

VIII.

The trial court did not abuse its discretion in refusing to declare a mistrial because a detective testified that Appellant said that the murder was none of his business and that he had nothing to do with it in that Appellant waived his right for appellate relief by only requesting a mistrial, the State's failure to disclose this statement during discovery was properly remedied by the giving of a curative instruction, and Appellant was not prejudiced by this testimony.

Appellant argues that the trial court abused its discretion in refusing to declare a mistrial based on the State's alleged failure to disclose one statement Appellant made to the police after they arrived at his house during the early morning hours of August 24, 2000.

A. Standard of Review

The declaration of a mistrial is a drastic remedy which should only be employed in the most extraordinary circumstances. *State v. Sidebottom*, 753 S.W.2d 915, 919-20 (Mo. banc 1988); *State v. Drewel*, 835 S.W.2d 494, 498 (Mo. App. E.D. 1992). Because the trial court is in a better position than an appellate court to evaluate the prejudicial effect of the incident giving rise to the mistrial request, this Court's review extends only to determining whether, as a matter of law, the trial court abused its discretion in refusing to declare a mistrial. *State v. Young*, 701 S.W.2d 429, 434 (Mo. banc 1985). "Appellate courts are loath to reverse judgments for failure to declare a mistrial unless they are

convinced the trial court abused its discretion as a matter of law in refusing to do to." *State v. Hill*, 906 S.W.2d 420, 425 (Mo. App. S.D. 1995).

B. The Discovery Violation

During trial, Detective Brady testified that Appellant acted "nonchalant" and did not seem distressed when he was told during the early-morning hours of August 23rd that his ex-wife had been found dead (Tr. 1189). But when Detective Brady testified during direct examination that Appellant told the detective that he did not know anything about the murder, Appellant's counsel requested a sidebar and alleged that the State had committed a discovery violation:

> Q. What did you say?
>
> A. I told him I couldn't understand how he could just sit there and be so relaxed and have such a carefree attitude knowing that his ex-wife, the mother of his daughter, was killed.
>
> Q. Did he have any response?
>
> A. Shook his head with a smile, said it's not his business. He had nothing to do with it.
>
> . . . .
>
> [Appellant's Counsel]: This is information being relayed by Detective Brady not contained in anything disclosed by the State, not brought up. He didn't mention it in his deposition and it is the State's obligation to disclose any statements purportedly made by Mr. Edwards and that has not been done in

this case. This is a complete surprise about these statements -- statements by Detective Brady. I request a mistrial.

. . . .

The Court: I'll overrule the motion for a new trial and instruct the jury to disregard the last statement of Detective Brady.

[Appellant's Counsel]: Your Honor, with all due respect, I don't think that curative instruction solves the problem. The inflammatory effect has already been had.

The Court: I understand. I'll instruct the jury to disregard.

. . . .

The Court: The jury is instructed to disregard the last statement of Detective Brady regarding any words that were uttered by Mr. Edwards.

(Tr.1190-93).

C. The Trial Court Did Not Abuse Its Discretion

Appellant's counsel's refusal to accept any relief short of a mistrial, prevents him from obtaining any relief on appeal. Appellant's counsel statement that a curative instruction was not sufficient operates to waive his claim on appeal. *See State v. Burch*, 939 S.W.2d 525, 528-29 (Mo. App. W.D. 1997) ("The prejudicial effect of a statement can be removed by striking the statement and instructing the jury to disregard it"). The fact that Appellant did not seek any relief other than a mistrial cannot aid him on appeal; a defendant

cannot build error into a case by not requesting lesser relief that may be more appropriate. *State v. Thurlo*, 830 S.W.2d 891, 894 (Mo. App. S.D. 1992).

"In reviewing criminal discovery claims, this Court will overturn the trial court only if it appears that the trial court abused its discretion to the extent that fundamental unfairness to the defendant resulted." *State v. Taylor*, 944 S.W.2d 925, 932 (Mo. banc 1997), *citing State v. Mease*, 842 S.W.2d 98, 108 (Mo. banc 1992).

The purpose of discovery is to permit the defendant a opportunity to prepare in advance for trial and to avoid surprise; the focus of the denial of discovery, therefore, is whether there is a reasonable likelihood that the denial of discovery affected the result of the trial. *Mease*, 842 S.W.2d at 108. Failure to comply with discovery does not mandate a reversal of a conviction, however. *State v. Davis*, 556 S.W.2d 45, 47 (Mo. banc 1977). Rather, the trial court must make a determination as to the effect of the noncompliance on the outcome of the case. *Id.* The decision to impose a sanction of some sort for a party's noncompliance with the discovery requests lies within the sound discretion of the trial court. *Kinder*, 942 S.W.2d at 338. The trial court is in the best position to assess the prejudicial effect of the failure to disclose and to determine what remedy was necessary to alleviate any unfairness. *State v. Petty*, 967 S.W.2d 127, 137 (Mo. App. E.D. 1998).

The actions the trial court took in this were appropriate. Appellant suffered no prejudice from this testimony. Not only was this evidence consistent with Appellant's claim at trial (that he did not have anything to do with the murder), other evidence of a similar character was adduced without objection. Moments after the disputed testimony,

Detective Brady testified without objection that Appellant stated that he did not know who committed the murder (Tr.1194). He repeated this testimony, again without objection, several different times during his appearance (Tr.1212,1222-23).

Appellant complains that the State used this testimony to portray him as uncaring about his ex-wife's death. But Appellant confuses two different pieces of evidence. If any evidence portrayed Appellant as uncaring about the murder, it was the testimony about his nonchalance or carefree attitude upon hearing the news. Appellant does not complain about that testimony in this appeal. Instead, Appellant is complaining about testimony that he made a statement saying that he did not have anything to do with the murder.

The trial court did not abuse its discretion in refusing to declare a mistrial under these circumstances. The court's curative instruction was sufficient to remedy the situation. In any event, Appellant was not prejudiced by this testimony.

IX.

The trial court did not plainly err in refusing to sua sponte declare a mistrial because of statements the prosecutor made during voir dire and guilt- and penalty-phase closing arguments in that the statements either were not objectionable or Appellant failed to prove they had a decisive effect on the outcome of the trial.

Appellant complains about several statements or arguments the prosecutor made during voir dire and in both guilt- and penalty-phase closing argument. None of these statements warrants plain error relief and Appellant suffered no manifest injustice by the trial court's failure to *sua sponte* declare the drastic remedy of a mistrial. Moreover, Appellant has failed to carry his burden of showing a reasonable probability that the result of the trial would have been different.

A. Standard of Review

Plain error relief is rarely appropriate for claims involving closing arguments. *State v. McDonald*, 661 S.W.2d 497, 506 (Mo. banc 1983). Courts are especially reluctant to find plain error in the contest of closing argument because the decision to object is often a matter of trial strategy, and without an objection and request for relief, the court options are narrowed to uninvited interference with summation and a corresponding increase of error by such intervention. *Mayes*, 63 S.W.3d at 633; *State v. Wise*, 879 S.W.2d 494, 516 (Mo. banc 1994). "[R]elief should be rarely granted on assertions of plain error to matters contained in closing argument, for trial strategy looms as an important consideration and

such assertions are generally denied without explication." *State v. Middleton*, 995 S.W.2d 443, 456 (Mo. banc 1999); *Clay*, 975 S.W.2d at 134.

Under plain error review, a conviction will be reversed for improper argument only when it is established that the argument had a decisive effect on the outcome of the trial and amounts to manifest injustice." *Middleton*, 995 S.W.2d at 456. "In order for a prosecutor's statements to have such a decisive effect, there must be a reasonable probability that the verdict would have been different had the error not been committed." *State v. Deck*, 994 S.W.2d 527, 543 (Mo. banc 1999).

B. Voir Dire

Appellant complains about the prosecutor's statement that "the State would have the burden of proving to your satisfaction unanimously that one or more aggravating circumstance exists" (Tr.370). But both the prosecutor and Appellant's counsel repeatedly told the jury during voir dire, including to the group to whom the alleged misstatement was made, that statutory aggravating circumstances must be proved beyond a reasonable doubt (Tr.389,394,399,560-61). Moreover, the penalty-phase jury instructions told the jury that it must find statutory aggravating circumstances beyond a reasonable doubt (L.F.482). To the extent the prosecutor misstated the law, Appellant suffered no manifest injustice.

Appellant also complains that the prosecutor told the jury on two occasions that the case involved a contract killing of Appellant's ex-wife (Tr.612,655). On both of these occasions, however, the prosecutor was exploring pre-trial publicity and whether anyone on the venire had heard about the case. Appellant's complaint here is curious, considering that

his counsel repeatedly told the jury during voir dire that the State was alleging that Appellant hired someone to kill his ex-wife (Tr.347-48,443,488,587,632-33, 671,677,715-16).

C. Guilt Phase

Appellant complains that the prosecutor improperly argued victim-impact during guilt-phase closing argument when he said that the victim's child:

> was denied the joy of having her mother seeing her while she is going to high school proms, the joy of having her mother help her plan her wedding, the joy of her mother seeing her daughter grow with a family, this child will never have that and this is for three hundred and fifty-one dollars a month

(Tr.1881). In reference to the discovery of the victim's body, the prosecutor stated that the victim's sister would "never forget it" (Tr.1885).

A prosecutor is entitled to argue matters supported by the evidence or matters that may be reasonably inferred from the record. *State v. Kreutzer*, 928 S.W.2d 854, 873 (Mo. banc 1996). A prosecutor may argue inferences fairly drawn from the evidence, even if the inferences are not necessarily warranted. *State v. Roberts*, 838 S.W.2d 126, 130 (Mo. App. E.D. 1992). The prosecutor's statement about the victim's daughter not having her mother was in reference to. Moreover, common sense suggests that the victim's daughter would not have her mother's company after the murder and that the victim's sister would never forget finding her sister dead. Neither of these arguments, to the extent either was objectionable, had a decisive effect on the jury.

Appellant also complains that the prosecutor stated that "I don't think most people in here believe that Michael actually exists" (Tr.1891). But the prosecutor has the right to argue the evidence and the reasonable inferences drawn from the evidence. *State v. Weathersby*, 935 S.W.2d 76, 79 (Mo. App. W.D. 1996). Arguing that "Michael" did not actually exist was a proper argument on the evidence and Appellant's credibility. Even Appellant's counsel argued that his statement to police, in which he claimed that he hired "Michael," was "fiction" (Tr.1908). Moreover, both the State and Appellant adduced evidence suggesting that the police did not believe "Michael" existed (Tr.1373,1419).

Appellant contends that the prosecutor argued facts not in evidence when he stated: "If a contract killing is not cool reflection then there is no cool reflection" (Tr.1893). But this comment was made while he was arguing to the jury that Appellant was guilty of first-degree murder because he deliberated, or cooly reflected, before arranging the contract.

Next, Appellant argues that the following statements involved facts not in evidence:

> This (indicating) is a correctional officer who deals with prisoners in the course of his profession, do you think that he's ever met a person yet who's told him they confessed to a murder to make it easier for his family to help himself out, to help is family for him to confess to the murder he had no involvement in?
>
> * * *
>
> Ladies and gentlemen, the defendant has been proven guilty beyond a reasonable doubt. Penitentiaries in the State of Missouri are filled with people who have been

found guilty beyond a reasonable doubt. It is not an impossible burden just because of this nonsense of–about Michael and we couldn't prove that he bought the checks. (Tr.1916,1920-21). But these statements were made in response to Appellant's counsel's argument that Appellant confessed to first-degree murder to protect his family, and that the State had not proved its case beyond a reasonable doubt because it offered no proof that Appellant cashed a check to pay for the murder (1895,1903,1907-08).

A prosecutor has considerable leeway to make retaliatory arguments in closing. *State v. Middleton*, 998 S.W.2d 520, 528 (Mo. banc 1999); *see also State v. Williams*, 849 S.W.2d 575, 579 (Mo. App. E.D. 1993) (prosecuting attorney may go further by way of retaliation in answering the argument of defense counsel than would be permitted in the first instance). Comments made during closing argument "must be interpreted with the entire record rather than isolation." *State v. Graham*, 916 S.W.2d 434, 436 (Mo. App. E.D. 1996). Considered in context, the prosecutor's statements were not improper.

Finally, Appellant claims that the prosecutor argued "uncharged conduct" when he stated:

> And this business about Florida, he couldn't do any of the things he said because he was in Florida. Was anybody offended by that? Here's a guy who hasn't paid child support taking trips in Florida. It's not just a trip, he's looking at a time share to buy into. I guess he'd have money freed up, he wasn't going to have to be paying five hundred dollars a month. He was expected to give his ex-wife five hundred dollars a month from the family budget he could be using in the time share in Florida.

(Tr.1918). This statement was made in response to Appellant's argument that he was in Florida on one of the dates he said he met "Michael" and was an attack on his credibility (Tr.1909). The statement also pertained to Appellant's motive to kill his ex-wife: to avoid paying child support.

To the extent that any of these statements referred to facts outside the record, such facts were matters of common knowledge. A prosecutor may refer to facts not before the jury so long as those facts do not imply any special knowledge of evidence pointing to a defendant's guilt. *State v. Newlon*, 627 S.W.2d 606, 617 (Mo. banc 1982). Prosecutor's may also argue matters that are within the common knowledge of the jury. *State v. Jones*, 7 S.W.3d 413, 419 (Mo. App. E.D. 1999).

D. Penalty Phase

Appellant contends that the prosecutor commented on his failure to testify, but the prosecutor, after hearing Appellant's nine penalty-phase witnesses, merely stated that Appellant had not expressed remorse to anybody:

> Ladies and gentlemen of the jury, we have just heard quite a bit about Kimber Edwards' life both before the time of his arrest and after in terms of his contacts with his family and his friend. What's the one thing we haven't heard about that Kimber Edwards has expressed to anyone, remorse. Any remorse, any sadness about the killing of Kimberly Cantrell and why haven't you heard about it? Because he hasn't obviously expressed it to anybody.

(Tr.2031). This statement was not a comment on Appellant's failure to testify during the penalty phase, but was a fair comment on whether Appellant had expressed remorse, which was a consideration for the jury in determining punishment.

This statement was similar to one approved in *State v. Tokar*, 918 S.W.2d 753, 769 (Mo. banc 1996), in which the prosecutor stated, "There has been absolutely no remorse exhibited." The statement here was not a direct comment on Appellant's failure to testify, or an indirect comment that was calculated to draw the jury's attention to that fact. *See Clemons*, 946 S.W.2d at 228.

Appellant contends that the prosecutor argued facts not in evidence when he said "There is nothing worse than hiring somebody else to do your dirty work for you. There is nothing more cowardly except the third aggravator, which is killing a witness, this is the worst one" (Tr.2034-35). Appellant also complains about statements the prosecutor made that no witnesses would testify if they feared being killed (Tr.2034-35).

In addition to hiring someone to kill another person, another statutory aggravating circumstance submitted to the jury in this case pertained to the killing of a witness (L.F.485). The prosecutor's statements were proper argument regarding the existence of both these circumstance and the punishment that should be imposed if the jury found the existence of either one.

Next, Appellant complains that the prosecutor attempted to change "mitigators into aggravators" when he discussed Appellant's lifestyle (Tr.2037). But this statement pertained to the appropriate punishment and simply told the jury that Appellant had no

excuse for his actions, and that his lifestyle suggested that he had no reason to have the victim killed over child-support payments that he did not want to pay (Tr.2037-38).

Finally, Appellant contends the prosecutor referred to matters outside the record when he stated:

> He has put everyone in this courtroom through a terrible, terrible experience that no one should ever have had to experience, you included, but if there is one person in this courtroom who is guilty, it's this man sitting here and if you look at this case and you look at the significance of what he did, again, coldly, dispassionately, a business like decision about money, this woman is going to cost me a lot of money, and I don't want to pay it, well, you know what, most people who don't like paying other people's debts that they owe, most father's in their divorce cases don't enjoy child support, but you know they do it because it's the right thing to do and if they love their child, they really do it. This love of Erica, this child he wouldn't even support, I don't buy it.

(Tr.2048). These statements were proper comment on the appropriate punishment considering Appellant's motive for the murder. Any facts outside the record suggested by the prosecutor were ones of common knowledge and experience. Finally, the statement was a proper response to Appellant's argument about concern for his daughter.

X.

The trial court did not err in overruling Appellant's Motion to Quash the Information because the State is not required to plead the statutory aggravating circumstances it intend to submit in the Information in that: (1) this precise claim was recently rejected by this Court in *State v. Tisius*; (2) neither *Apprendi v. New Jersey* nor *Ring v. Arizona* contain such a requirement; and (3) Appellant received pretrial notice of these circumstances according to § 565.005, RSMo 2000, which satisfied Appellant's Sixth and Fourteenth Amendment rights to be informed of the nature and cause of the accusation against him.

Appellant's attacks the indictment on the ground that the statutory aggravating circumstances were not pleaded in the information or indictment filed against Appellant. As Appellant acknowledges, this claim was recently rejected by this Court in *State v. Tisius*, 92 S.W.3d 751 (Mo. banc 2002):

> The Appellant's contention of a violation of *Apprendi* is without merit: pursuant to section 565.005.1, the State gave Appellant notice that it would seek the death penalty, and the aggravating circumstances were proved to a jury beyond a reasonable doubt. "The maximum penalty for first-degree murder in Missouri is death, and the required presence of aggravating facts or circumstances to result in this sentence in no way increases this maximum penalty."

Id. at 766-67, *quoting State v. Cole*, 71 S.W.3d 163, 171 (Mo. banc 2002). Appellant's attempt to avoid this holding by relying on *Bullington v. Missouri*, 451 U.S. 430, 438 (1981), is unavailing.

Under § 565.005.1, RSMo 2000, the state is required to give the defendant notice "[a]t a reasonable time before the commencement of the first stage of [a capital trial]" of the statutory aggravating circumstances that it intends to submit in the event that the defendant is convicted of first degree murder. The State did so in this case (L.F.40-41). Although phrased as a challenge to the charging document in this case, Appellant's real contention, as demonstrated in his Point Relied On, is that § 565.005.1 is unconstitutional under *Apprendi*.

Appellant's construction of *Apprendi* as creating a requirement that statutory aggravating circumstances be pled in the indictment or information is refuted by the language of that decision. The issue presented to the United States Supreme Court in that case was "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 469 (2000). Relying upon the guarantee under the Sixth and Fourteenth Amendments of a trial by jury, the Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 476, 490. Thus, the holding of *Apprendi* concerned what matters must be

submitted to and found by a jury, not what must be contained in an indictment or information.

If the plain language of the *Apprendi* Court's holding were not sufficient to dispose of Appellant's reliance on that case, then it should be eviscerated by the fact that the Court *expressly stated* that it was not addressing what must be alleged in the charging document:

> Apprendi has not here asserted a constitutional claim based on the omission of any reference to sentence enhancement or racial bias in the indictment. . . . [The Fourteenth] Amendment has not . . . been construed to include the Fifth Amendment right to "presentment or indictment of a Grand Jury" that was implicated in our recent decision in *Almendarez-Torres v. United States*. We thus do not address the indictment question separately today.

Apprendi, 530 U.S. at 476 n.3 (citation omitted).

Appellant ignores the stated holding of *Apprendi* and the footnote quoted above, but his argument is still without merit to the extent he relies on language from *Jones v. United States*, 526 U.S. 227 (1999), which was identified in *Apprendi* as "foreshadowing" the *Apprendi* decision. *Apprendi*, 530 U.S. at 476.

The issue in *Jones* concerned the construction of the federal carjacking statute. In particular, the issue focused on whether particular statutory language was an "element" of the crime, in which case it was required to be alleged in the indictment and found by the jury; or whether it was a "sentencing factor" that need not be charged and could be found by

the court. *Jones*, 526 U.S. at 230-232.[5] The majority found that the statutory language constituted an element of the crime, but noted in extended *dicta* its view that sentence enhancements might also violate due process if not charged and found by the trial jury. *Id.* at 240-50.[6] The majority's view was that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.*. at 246 n.6.

This *dicta* from *Jones* certainly "foreshadowed" the holding in *Apprendi* that any fact that increased the range of punishment must be found by a jury. That the Jones dicta concerning what must be pleaded in an indictment was not a holding in *Apprendi* is established by: (1) the statement in *Apprendi* that it was not addressing what must be pled in the indictment; (2) the fact that the quotation from *Jones* cites the Fifth Amendment to the United States Constitution which, in the context of indictments, applies to the federal government (as in *Jones*) but not to the states (as in *Apprendi*); and (3) the rejection of this

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[5]This distinction between "elements" and "sentencing factors" was later abolished in *Apprendi*. 530 U.S. at 478-90.

[6]That this was *dicta* was confirmed in *Apprendi*. 530 U.S. at 472-73.

construction of *Apprendi* by other jurisdictions.[7] Any claim that *Apprendi* supports his argument is without merit.

The United States Supreme Court's recent decision in *Ring v. Arizona*, 122 S.Ct. 2428 (2002), which for the first time held that the Sixth and Fourteenth Amendments do not allow "a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty," does not alter this analysis. *Id.* at 2443. An examination of that decision confirms that it does not, any more than *Apprendi*, hold that statutory aggravating circumstances must be pled in the indictment or information. The Supreme Court noted that the issue before it was limited:

> Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. . . . Ring does not contend that his indictment was constitutionally defective. *See Apprendi*, 530 U.S., at 477, n.3 (Fourteenth Amendment "has not . . . been construed to include the Fifth Amendment right to 'presentment or indictment of a Grand Jury'").

Id. at 2437 n.4.

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[7] *See e.g.*, *Poole v. State*, 2001 Ala. Crim. App. Lexis 173 (as corrected April 8, 2002); *State v. Nichols*, 33 P.3d 1172, 1174-76 (Ariz. App. 2001); *State v. Mitchell*, 543 S.E.2d 830, 842 (N.C. 2001), *cert. denied*,122 S.Ct. 475 (2001); *United States v. Sanchez*, 269 F.3d 1250, 1257-62 (CA11 2001), *cert. denied*, 122 S.Ct. 1327 (2002).

The Indictment Clause of the Fifth Amendment does not apply to the states. *Apprendi*, 530 U.S. at 477 n.3. The only constitutional provision relevant to state charging documents is the Sixth Amendment requirement that an accused "be informed of the nature and cause of the accusation," which has been applied to the states through the Fourteenth Amendment. *Blair v. Armontrout*, 916 F.2d 1310, 1329 (CA8 1990). The difference between the rights guaranteed by the Fifth Amendment and those guaranteed by the Sixth and Fourteenth Amendments is instructive. The Fifth Amendment's Indictment Clause specifies that criminal charges must be initiated by a grand jury indictment and requires that all elements of the criminal offense charged be stated in the indictment. *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998).[8]

The Sixth and Fourteenth Amendments, by contrast, require only that a criminal defendant receive notice of the "nature and cause of the accusation" and do not specify the form that this notice must take.[9] Even legally insufficient charging documents have been

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[8]When it decided *Ring*, the Supreme Court had before it a claim in a *federal* death penalty case that the Fifth Amendment required that statutory aggravating circumstances be pleaded in the indictment. It remanded that case for reconsideration in light of *Ring*. *United States v. Allen*, 247 F.3d 741 (C.A.8 2001), *remanded* 122 S.Ct. 2653. That case is still pending.

[9]"[T]he states are not bound by the technical rules governing federal criminal prosecutions" under the Fifth Amendment. *Blair*, 916 F.2d at 1329. Fifth Amendment decisions are therefore of "little value" in evaluating state indictments or informations.

held not to violate the Sixth Amendment when the defendant received actual notice of the charge against him. *Hartman*, 283 F.3d at 194-96; *Blair*, 916 F.2d at 1329. Under Missouri law, Appellant was entitled to, and received, notice before trial of the statutory aggravating circumstances that the state intended to offer in the punishment phase. Nothing in *Apprendi*, *Ring*, or any other case supports Appellant's claim that this notice provision violates the Sixth and Fourteenth Amendment to the United States Constitution.

Accordingly, Appellant's challenge to the constitutionality of § 565.005.1 is without merit.

Hartman v. Lee, 283 F.3d 190, 195 n.4 (CA4 2002).

XI.

The trial court did not abuse its discretion in denying Appellant's motion for continuance on the ground that he could not locate a witness because Appellant's motion was both procedurally and substantively deficient in that the motion failed to comply with Rule 24.10, Appellant failed to prove that the witness could be served within a reasonable time, another witness Appellant called at trial could have provided the same information, the testimony of the unavailable witness was not material and constituted mere impeachment evidence.

The trial court did not abuse its discretion in denying Appellant's motion for continuance. Not only did Appellant's motion failed to comply with the Rule 24.10, he made no showing that entitled him to a continuance.

A. Standard of Reveiw

The decision to grant or deny a continuance is within the sound discretion of the trial court, and the ruling will be reversed only upon a very strong showing of abuse of discretion. *State v. Thompson*, 985 S.W.2d 779, 785 (Mo. banc 1999). This rule applies even where a continuance is sought because of the absence of a material witness. *State v. Coats*, 835 S.W.2d 430, 433 (Mo. App. E.D. 1992). If the court denies a defendant's motion for continuance, the defendant must demonstrate that the denial prejudiced his case. *Taylor*, 944 S.W.2d at 930. The trial court will not be reversed on appeal unless the witness's testimony would have been outcome determinative. *State v. Fuller*, 837 S.W.2d 304, 307 (Mo. App. W.D. 1992).

B. Appellant's Motion For Continuance

On April 15, 2002, the day before trial began, Appellant fax-filed a motion for continuance (Tr.192; L.F.387-95). Appellant's motion contained a short paragraph relating to this claim on appeal:

> 9. Defense counsel need a continuance to locate the following witnesses:
>
> A. Earl and Patricia Baker
>
> B. Terrance McGraw
>
> C. Robert Smith

(L.F.393). Appellant orally informed the trial court that the testimony of Terrance McGraw and Robert Smith would impeach the testimony of Donnell Watson that Appellant and Orthel Wilson had met with each other (Tr. 211-12). The trial court denied the continuance because Appellant had been unable to serve the witnesses and offered no proof that he would be able to do so in a reasonable time (Tr.211-12). Presumably, because Mr. McGraw testified during the penalty phase (Tr.1974-85), Appellant's only claim on appeal is that the trial court erred in denying his continuance to obtain Mr. Smith's testimony. The trial court did not abuse its discretion in denying Appellant's motion because it was deficient in several respects.

C. The Deficiencies In Appellant's Motion

First, the motion itself failed to comply with Rule 24.10, which governs motions for continuance due to the absence of a witness. Appellant's motion failed to contain "facts showing the materiality of the evidence sought to be obtained and due diligence upon the

part of the applicant to obtain such witness or testimony." Rule 24.10(a). The motion also failed to provide either the witness's address or the due diligence used to obtain that address, and it contained no "facts showing reasonable grounds for belief that the attendance or testimony of such witness will be procured within a reasonable time." Rule 24.10(b). Finally, the motion failed to identify the "particular facts the . . witness will prove, and that [Appellant knows of no other person whose evidence or attendance [Appellant] could have procured at the trial, by whom [Appellant] can prove or so fully prove the same facts." Rule 24.10(c). Appellant's failure to comply with the Rule 24.10 is sufficient grounds alone on which to affirm the trial court's denial of appellant's request for continuance. *State v. Sweet*, 796 S.W.2d 607, 613 (Mo. banc 1990).

Second, Appellant failed to prove to the trial court that any reasonable grounds existed to believe that Mr. Smith could be served within a reasonable time. All Appellant's Counsel could tell the trial court was that these witnesses lived in St. Louis City (Tr.212).

Third, one of the witnesses Appellant attempted to serve, Mr. McGraw, actually testified during the penalty phase. Appellant represented to the trial court that the testimony of both Mr. McGraw and Mr. Smith would impeach the testimony of Donnell Watson and Hughie Wilson concerning whether Appellant and Orthel Wilson had met both immediately before and after the murder. Mr. McGraw was apparently served and testified at trial. Appellant has made no showing why Mr. McGraw could not have testified for Appellant during the guilt phase, which ended only one day before the penalty phase began. According to what he told the trial court, Appellant had the opportunity to obtain from Mr.

McGraw the testimony that he now claims was unavailable to him because of the trial court's ruling. Appellant's Brief does not explain why McGraw could not have provided the testimony that his trial counsel told the trial court he would provide if a continuance were granted. In fact, during the hearing on the motion for new trial, Mr. McGraw testified that he saw Appellant at the apartments between 9 and 9:30 p.m. on August 22 and that he did not see Appellant go into any of the apartments (Tr.2080-81).

Finally, the evidence Mr. Smith might have provided was not material. First, as Appellant's counsel told the trial court, the testimony Mr. Smith would have provided would be used to impeach or rebut the testimony of Donnell Watson and Hughie Wilson that Appellant and Orthel had meetings both before and after the murder. Second, Mr. Smith testified during the hearing on Appellant's motion for new trial that he saw Appellant at the Palm Street apartments on August 22 between 8 and 9 p.m. (Tr. 2059-61). Donnell Watson testified that Appellant was there after 8 p.m. (Tr.1440-41). Mr. Smith could not remember if he saw Appellant on August 21 or 23 (Tr. 2063-63). Mr. Smith testified that he did not see Appellant go into any of the apartments on August 22 (Tr. 2061-63).

Mr. Smith's proposed testimony would not have changed the outcome of the trial. His testimony was not direct proof that Appellant and Orthel did not meet, but only that Mr. Smith did not see Appellant go into any of the apartments. This is not the same as proving that Appellant and Orthel did not meet on that evening. The trial court did not abuse its discretion is denying Appellant's motion for continuance.

XII.

This Court should, in the exercise of its independent statutory review, affirm Appellant's death sentence because: (1) the sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) the evidence supports the jury's findings of aggravating circumstances, and; (3) the sentence is not excessive or disproportionate to those in similar cases considering the crime, the strength of the evidence and the defendant.

Under the mandatory independent review procedure contained in § 565.035.3, RSMo 2000, this Court must determine:

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other factor;
>
> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection 2 of section 565.032 and any other circumstance found;
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the strength of the evidence and the defendant.

This Court's proportionality review is designed to prevent freakish and wanton application of the death penalty. *State v. Ramsey*, 864 S.W.2d 320, 328 (Mo. banc 1993).

Nothing in the record suggests that Appellant's sentence was imposed under the influence of prejudice, passion, or any other improper factor. Appellant contends that it

was, but then supports his claim by simply repeating his allegations of trial court error argued earlier in his brief.

Appellant claims that insufficient evidence existed to support the statutory aggravating circumstance found by the jury, because the only evidence to prove that Appellant hired Orthel or "Michael" to kill the victim came from Appellant's confession. But as demonstrated earlier under Point VI, this assertion is factually incorrect. Although Appellant's confession itself provides more than sufficient evidence from which the jury could find that Appellant hired either Orthel, "Michael," or both to kill the victim, the record contains evidence that Appellant hired Orthel independent of his confession.

The record showed that Orthel lived in one of Appellant's apartments and was employed by Appellant, that Appellant and Orthel met both immediately before and after the murder, that Orthel was near the victim's residence near the time of the murder, and that Orthel directed the police to the murder weapon, and that the murder weapon was found hidden in a vacant house across the street from Orthel's apartment, which Appellant owned and allowed Orthel to live in.

Appellant claims that the sentence is disproportionate because Orthel was sentenced to life without parole for his participation in the murder (Tr.1989). Even if this were true, it is not relevant to this Court's inquiry. Whether a co-defendant receives a death sentence is not pertinent to this Court's proportionality review. *See Rousan*, 961 S.W.2d at 854. Appellant also argues his sentence was disproportionate because his daughter sent a letter to the trial court before sentencing asking that the court not to impose the sentence the jury

recommended (L.F.742). But her wishes concerning Appellant's sentence have no bearing on what sentence should be imposed. *See Barnett*, 980 S.W.2d at 308 (rejecting the defendant's claim that his death sentence be set aside because the victims' relatives wrote a letter to the trial judge before sentencing and asked that the defendant not be sentenced to death); *see also State v. Jones*, 979 S.W.2d 171, 179 (Mo. banc 1998).

Appellant also claims that this Court's proportionality review violates due process and is fatally flawed because it does not provide timely notice or a meaningful opportunity to be heard, and it considers only cases in which death was imposed, and not all factually similar cases. These claims have been repeatedly rejected. *See State v. Smith*, 32 S.W.3d 532, 558 (Mo. banc 2000); *Rousan*, 961 S.W.2d at 854-55; *Clay*, 975 S.W.2d at 146.

Finally, this Court has upheld death sentences in other cases in which a murder was committed for hire. *Basile*, 942 S.W.2d at 342; *State v. Blair*, 638 S.W.2d 739 (Mo. banc 1992); *State v. Bannister*, 680 S.W.2d 141 (Mo. banc 1984). Death sentences have also been upheld in cases in which the defendant received a death sentence even when it appeared that an accomplice and had done the actual killing. *Skillicorn*, 944 S.W.2d at 877; *State v. Gray*, 887 S.W.2d 369 (Mo. banc 1994); *State v. Shurn*, 866 S.W.2d 447 (Mo. banc 1993); *State v. Kilgore*, 771 S.W.2d 57 (Mo. banc 1989); *State v. Schlup*, 724 S.W.2d 236 (Mo. banc 1987); *State v. Roberts*, 709 S.W.2d 857 (Mo. banc 1986); *State v. Gilmore*, 681 S.W.2d 934 (1984). "Murder to avoid inconvenience to the murderer exhibits a lack of respect for human life that has been held to warrant the harshest penalty." *Skillicorn*, 944 S.W.2d at 899; *Gray*, 887 S.W.2d at 389; *Parker*, 886 S.W.2d at 908. The

record here showed that Appellant contracted for the murder of his ex-wife because she was causing him problems regarding child support and child custody issues.

CONCLUSION

The trial court did not commit reversible error in this case, and Appellant's death sentence was not contrary to Missouri law. Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned assistant attorney general hereby certifies that:

(1) That the attached brief includes the information required under Rule 55.03 and complies with the limitations contained in Rule 84.06(b) in that it contains 27,611 words, excluding the cover, the signature block, this certification, and any appendix, as determined by WordPerfect 9 software; and

(2) That the floppy disk, which contains a copy of this brief, filed with this Court has been scanned for viruses and is virus-free; and

(3) That a copy of this brief and a floppy disk containing this brief, were mailed, postage prepaid, on April 14, 2003, to:

Janet M. Thompson
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Columbia MO 65201

_____
Assistant Attorney General